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Articles

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INTRODUCTION

It is a buyer's market for foreign investors seeking remedies for wrongs they have allegedly suffered at the hands of host governments. A national of Country A who invests in Country B and suffers a loss can seek redress in a number of places. An investor can usually seek relief in the courts of the host state, but, increasingly also has more cosmopolitan options to consider, including investor-state arbitration on the grounds of breach of contract or violations of an investment treaty. Should the investment in question overlap with a trade dispute, regional or multilateral dispute settlement might be available. Sorting out how these tribunals relate to each other is difficult.

The proliferation of tribunals is not problematic in and of itself. The coexistence of multiple and varied peaceful mechanisms for the settlement of investment disputes is theoretically good. It is certainly a significant advance over the gunboat diplomacy of the nineteenth and early twentieth centuries.[1] The notion that the free movement of goods,

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1. *See* Oscar Schachter, *Philip Jessup's Life and Ideas*, 80 AM. J. INT'L L. 878, 893 (1986) (noting

services, and capital is desirable is premised on the comparative advantage some nations have in certain sectors.[2] Competition encourages innovation, forces improvements in quality, and often leads to the most efficient use of resources.[3] Can competition among dispute settlement mechanisms bring similar advantages? It should result in improved quality of the adjudicatory services provided. In particular, such competition should be advantageous to claimants who seek relief and to defendant States who seek the fair, expeditious disposition of claims against them. Judges or arbitrators, however, may perceive the existence of competition more as a threat to their authority than as an exogenous force for improvement and innovation.[4] This perception may itself undercut the efficiency of dispute settlement.

To date adjudicatory competition among international tribunals has not been advantageous for the parties appearing before them. There are two primary problems. First, competition is to some extent illusory: available remedies and jurisdictional authority are often so fragmented among tribunals that a claimant must seek relief in multiple fora in order to be made whole. The tribunals in such instances are effectively insulated from competition with each other.[5] Second, when there is actual overlap in tribunal jurisdiction and duplication in proceedings, tribunals have few tools available to respond to the existence of other proceedings. In such cases, the possibility of bringing duplicative cases brings disrepute to international dispute settlement mechanisms without corresponding advantages in innovation, quality, or efficient allocation of resources.

The first problem, fragmentation, is primarily one of inefficiency. Multiple tribunals must educate themselves about the same facts underlying the claim at issue, while claimants and defendants have the expense of coordinating multiple proceedings. Yet it is not readily apparent to the casual observer that jurisdictional fragmentation makes

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Judge Jessup's view that gunboat diplomacy led to abuses by powerful states); Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437, 438–39 (1981) (discussing the substitution of international law for the restrictions previously imposed by colonialism and gunboat diplomacy in the context of nationalizations).

2. *See* DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION ch. 7, para. 16; ch. 19, para. 1 (R.D. Irwin 1963) (1817).

3. States compete for the right to regulate cross-border transactions. Competition can be both adversarial and cooperative; properly managed, it can lead to a "race to the top." Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, *in* TRANSATLANTIC REGULATORY COOPERATION 167, 170–75, 201–02 (George Bermann et al. eds., 2000).

4. The Oxford English Dictionary defines competition as "[r]ivalry in the market, striving for custom between those who have the same commodities to dispose of." OXFORD ENGLISH DICTIONARY 604 (2d ed. 1989).

5. *See* YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 21 (2003) ("[J]urisdictions are deemed truly to compete with one another for business only if the involved parties can hope to achieve comparable results from the rival procedures.").

multiple proceedings necessary. Instead, she may perceive foreign investors having access to so many avenues for relief that they are unduly favored by states and even by international law generally.[6]

The second problem, duplication, is one of fairness and abuse of process, both real and perceived. Forum shopping in the municipal court context is often viewed as a luxury which, if conferred on claimants too liberally, is unfair to defendants. "Forum-shopping is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor indignation."[7] Forum shopping can be corrosive, however, when it gives rise to the possibility of multiple bites at the apple—the chance of gaining relief in a second forum notwithstanding the first forum's dismissal of a suit, or even worse, duplicative relief if suits in both tribunals proceed successfully.

Foreign investors with multiple options for seeking relief are subject to criticisms similar to those levied at claimants in municipal courts.[8] A foreign investor can tailor its case, and even manipulate its corporate structure, in order to invoke the jurisdiction of the tribunal most likely to grant it the relief sought.[9]

The problems underlying the existence of duplicative proceedings are exacerbated by the fact that tribunals lack the means to coordinate proceedings when their jurisdictions overlap with those of other tribunals. The occurrence of overlapping jurisdictions between tribunals is not new; in the classic subject matter of private international law, or conflict of laws, municipal courts are faced with disputes involving cross-

6. MARY BOTTARI & LORI WALLACH, CITIZEN PUBLIC, NAFTA'S THREAT TO SOVEREIGNTY AND DEMOCRACY: THE RECORD OF NAFTA CHAPTER 11 INVESTOR-STATE CASES 1994–2005: LESSONS FOR THE CENTRAL AMERICAN FREE TRADE AGREEMENT xiv (2005), *available at* http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf (stating that foreign investors are given more opportunities to seek justice than other parties); Laurence Shore, *Book Review*, 22 ARB. INT'L 627, 627 (2006) (reviewing JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005)).

7. The Atlantic Star, [1974] A.C. 436, 471 (H.L.) (appeal taken from Eng.) (U.K.).

8. Richard H. Kreindler, *"Arbitral Forum Shopping": Some Observations on Recent Developments in International Commercial and Investment Arbitration*, 16 AM. REV. INT'L ARB. 157, 157 (2005).

9. The principle of non-responsibility holds that states are not responsible under international law for injuries to their own nationals. (Human rights law is a notable exception to this practice.) Thus, only a foreign investor may bring a claim for a violation of the law of state responsibility. Corporations can manipulate the structure of their investments to ensure that there is a cross-border relationship that places their investment under the protection of a BIT. *See* Barton Legum, *Defining Investment and Investor: Who is Entitled to Claim?*, 22 ARB. INT'L 521, 526 (2006). For example, many oil companies own their Venezuelan investments through Dutch subsidiaries, and The Netherlands and Venezuela have a BIT providing protections to Dutch-owned investments. *See e.g.*, Oliver L. Campbell, Op-Ed. Commentary, PETROLEUMWORLD NEWS, Aug. 17, 2007, *Arbitration Under a Bilateral Investment Treaty*, http://www.petroleumworld.com/Ed07071701.htm.

border transactions. The common law approach to conflict of laws rests on three pillars—jurisdiction, choice of law, and the recognition of judgments—that help a municipal court manage transnational disputes. There is as yet no comprehensive set of conflicts rules available to judges or arbitrators in international tribunals. Creating rules for use by international courts and tribunals is difficult given the discrete and fragmented nature of the tribunals and their authority. They do not exist within a single dispute settlement system.

Municipal courts manage jurisdictional conflicts with abstention doctrines such as *forum non conveniens* and comity; they minimize the ill effects of forum shopping by choice of law analysis; and they recognize awards and holdings in related cases through doctrines such as *res judicata* and collateral estoppel. These tools transfer only partially to the international sphere. Entrenched assumptions about private and public international law have limited the development of procedural and substantive legal theories that would reflect the changes in global dispute settlement illustrated by the proliferation of tribunals. These limitations are demonstrated clearly in hybrid investor-state arbitral tribunals. These tribunals are based on the private international dispute resolution model of international commercial arbitration, but public international law elements have been grafted on to that private substructure.[10] Lack of analytic clarity about matters such as the presumed identity of interest between investors and their home states leads to difficulty in determining whether proceedings are indeed duplicative.

The challenge is to develop legal tools that will permit the benefits of competition in the international dispute settlement system to outweigh the disadvantages.[11] The ideal would be to lessen the duplication of effort required by claimants faced with fragmented systems for dispute settlement while minimizing or eliminating the possibility of claimants' duplicative recovery. Existing private international law approaches can help in this process, but will be of limited use unless some public international law principles adapt to reflect a pluralistic legal order. Achieving more coordination, and even harmonization, among tribunals will require moving beyond the historic distinction between states and individuals in international law. Individuals will need to have recognized status and be treated as owning acquired rights, rather than as merely owning derivative rights, to effect this change.

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10. For an excellent and comprehensive description of the "hybrid" nature of investor-state arbitration, see Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151 (2004).

11. Some publicists have started to broach these problems. *See, e.g.*, Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835, 844–45 (2005) (discussing "integrationist" and "disintegrationist" methodologies in approaching multifaceted disputes).

International law scholars have started to analyze the effects of international tribunal proliferation, but to date these studies have focused on permanent tribunals rather than on *ad hoc* bodies whose life spans are coextensive with the duration of the case before them.[12] The temporary nature of these *ad hoc* tribunals belies their increasing importance as pieces in the puzzle of international dispute settlement. Of necessity, hybrid investor-state tribunals, and particularly those convened under investment treaties, are the most likely laboratories for the development of legal theories designed to surmount the problems of fragmentation and duplication. For investment treaty arbitral tribunals, the lack of means to manage relationships with other tribunals can be a particular handicap. First, an investor-state arbitral tribunal convened under an investment treaty often faces jurisdictional issues from the beginning.[13] These often hinge on the allocation of power between national courts and international tribunals. Second, investment treaties typically have very broad standing provisions. Other international tribunals or domestic courts or administrative tribunals may have rendered decisions in related cases, or may be considering on-going cases. Thus, an investor-state tribunal will be confronted with arguments as to the *res judicata* effect to be given to an earlier decision or the *lis pendens* effect of concurrent cases. Finally, an investor-state tribunal has some flexibility in the application and development of both procedural and substantive legal principles.

This Article goes beyond earlier studies of international tribunal proliferation by discussing international investment tribunals. It focuses on the tribunals that deal with international economic law issues in order to facilitate discussion of the problems facing the international community with respect to poor coordination among states at the stage of tribunal creation. Part I examines the proliferation of international

12. *See, e.g.*, JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 401–520 (2005) [hereinafter ALVAREZ, INTERNATIONAL ORGANIZATIONS]; SHANY, *supra* note 5; Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC'Y INT'L L. PROC. 160, 160 (2000); José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405 (2003); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101 (1998) (Neth.) [hereinafter Charney, *Is International Law Threatened?*]; Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999) [hereinafter Charney, *Impact*]; Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999); Ernest Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143 (2005).

13. The predilection of defendant states to challenge the jurisdiction of tribunals is marked. *See generally* MEG KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, 1101-1 to -50 (2006); John Yukio Gotanda, *An Efficient Method for Determining Jurisdiction in International Arbitrations*, 40 COLUM. J. TRANSNAT'L L. 11, 12–14 (2001).

courts and tribunals in the post-World War II period. It identifies those tribunals most likely to be involved in international economic law disputes. Part II examines more closely the fragmented nature of international dispute settlement and the compartmentalization of relief available to claimants. It posits that classic public international law principles relating to the status of individual in international law exacerbate fragmentation and duplication, and suggests that only a reconceptualization of that status will permit the resolution of these problems. Part III illustrates fragmentation and duplication through the lens of the most recent *Softwood Lumber* dispute between the United States and Canada and the infamous *Lauder* cases. Part IV identifies and analyzes the efficacy of the techniques international tribunals have already employed to manage jurisdictional overlaps and conflicts. It then identifies some of the private international law solutions municipal courts have devised for coordinating conflicting cases and addresses the barriers international tribunals face when trying to adapt those techniques for their own purposes. In conclusion, the Article suggests that a fundamental theoretical advance about the place of individuals in the international legal order is needed to permit a desirable coordination, and ultimately a harmonization of effort, among tribunals in the international economic law sphere.

I. THE PROLIFERATION OF INTERNATIONAL COURTS AND TRIBUNALS

The abundance of international dispute settlement mechanisms in the latter part of the twentieth century is not surprising.[14] Particularly in the aftermath of two World Wars, promoting non-violent settlement of disputes was the ideal of many peoples around the world. Indeed, Article 33 of the U.N. Charter requires resort to the peaceful settlement of disputes and sets forth various mechanisms that states might employ.[15] Differences in the kinds of tribunals available to solve international disputes demonstrate innovation on the part of states and private actors. The tribunals established run the gamut from the ICJ, a permanent tribunal with very broad subject matter jurisdiction; to the World Trade

14. *See* Thomas Buergenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, 22 ARB. INT'L 495, 496–97 (2006) (noting two reasons for proliferation of dispute settlement mechanisms: as more tribunals exist to hear more cases the predictability of outcomes increases; as tribunals are perceived to be successful, international organizations are inclined to emulate that success by imitation); Rosalyn Higgins, *International Law in a Changing International System*, 58 CAMBRIDGE L.J. 78, 84 (1999). "The more our world is globalised, the more we all have to depend upon each other for our common welfare, the less the State retains its monopoly as an international actor and the more systems of dispute settlement we are likely to find." *Id.*

15. "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." U.N. Charter art. 33, para. 1.

Organization's (WTO) Dispute Settlement Body, a permanent tribunal with very limited subject matter jurisdiction; to regional standing tribunals; and to *ad hoc* tribunals convened to hear a single dispute between an investor and a host government. Some are considered to be public international law tribunals, others private international law tribunals, and still others are a hybrid of the two.[16]

This Article focuses on international economic law and the tribunals hearing cases about economic law matters. Detlev Vagts, in his recent article on the history of international economic law, defined it as "the international law regulating transborder transactions in goods, services, currency, investment, and intellectual property"[17]—a succinct yet comprehensive description. To a large extent the fields of trade and investment are viewed as discrete systems, and there are significant differences in the dispute settlement options available to foreign investors as opposed to foreign traders.[18] Investors have been protected by bilateral treaties permitting private rights of action for money damages, while traders have been protected by the General Agreement on Tariffs and Trade (GATT) and its successors. Yet many foreign investors are also traders, and vice versa. Each is thus protected by more than one treaty or treaty chapter, and is increasingly able to seek relief in multiple venues.

Nearly any court or tribunal may have before it a case falling within the rather broad realm of international economic law. Yet experience suggests that certain tribunals are more likely to play recurring roles in international economic law disputes than others, and are more likely to hear disputes related to disputes brought in other tribunals. The ensuing section introduces those in which foreign investors, whether acting alone or with the assistance of their home states, are most likely to seek relief.[19]

A. THE INTERNATIONAL COURT OF JUSTICE (ICJ)

The ICJ is the preeminent international tribunal. It has no appellate function and fills no supervisory role with respect to other international

16. *See* Douglas, *supra* note 10, at 152–60 (discussing the departure of investment treaty tribunals from the traditions of both private and public international law).

17. Detlev F. Vagts, *Centennial Essay: International Economic Law and the* American Journal of International Law, 100 AM. J. INT'L L. 769, 769 (2006). Professor Vagts noted that there are even more expansive definitions: "'the total range of norms (directly or indirectly based on treaties) of public international law with regard to transnational economic relations.'" *Id.* (quoting PIETER VERLOREN VAN THEMAAT, THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW 9 (1981)).

18. For a lucid and insightful analysis of these differences, see Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005).

19. It is therefore not a comprehensive listing of international tribunals. Cesare Romano, writing in 1999, compiled a list of over forty permanent international tribunals. Romano, *supra* note 12, at 718–19. Roger Alford, writing in 2000, counted more than fifty. Alford, *supra* note 12, at 160. Neither list included *ad hoc* tribunals that could be constituted under various existing treaties.

tribunals, but it is a United Nations body and its position stems from that status. The ICJ has decided relatively few cases in the category of international economic law, but those that it has decided have had lasting resonance given the ICJ's stature.[20] The subject matter jurisdiction of the ICJ is very broad; however, only states may submit cases to it for decision, and its jurisdiction over individual states depends on their consent.[21] Its processes are often cumbersome, though it can act with dispatch on occasion.[22] The ICJ uses international law to decide the cases submitted to it,[23] and may give declaratory relief or may order states to pay damages.[24]

Given the limitations of the ICJ, the development of specialized tribunals was inevitable.[25] Indeed, several multilateral treaties, such as the GATT, its successor the Marrakesh Agreement Establishing the WTO, and the U.N. Convention on the Law of the Sea, have established tribunals to hear disputes brought under their constitutive treaties.[26] The development of those and other specialized tribunals makes even less likely the ICJ's hearing a significant number of investment cases in the future.

The importance of the ICJ is not, however, limited to direct decision-making, but also stems from the role its decisions play in other contexts. For example, although the governing rules of the ICJ do not provide for its decisions to have a precedential effect, in practice they are

20. Two notable examples are Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20), and Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain) 1970 I.C.J. 4 (Feb. 5).

21. Statute of the International Court of Justice arts. 34(1), 36(1), June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter ICJ Statute]. As of February 2006, sixty-five states had subscribed to the compulsory jurisdiction of the court. Int'l Court of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (last visited Nov. 22, 2007). A state that has not subscribed to the compulsory jurisdiction of the court can consent to individual cases being brought before the court either by means of a compromissary clause in a treaty or other agreement. ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 70 (Terry D. Gill ed., 6th rev. ed. 2003).

22. For example, in *Breard*, the Republic of Paraguay sought provisional measures from the International Court of Justice that would stay the execution of Angel Breard pending the Court's decision on the proper interpretation of the United States' alleged breach of the Vienna Convention on Consular Relations. Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 248, 258 (Apr. 9). The Court unanimously indicated provisional measures six days after Paraguay's request. CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 365–67 (2004).

23. ICJ Statute, *supra* note 21, at art. 38, para. 1. The ICJ may also decide a case *ex aequo et bono*, if the parties agree. *Id.* art. 38, para. 2.

24. *See generally* SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2005 (4th ed. 2006).

25. Higgins, *supra* note 14, at 84–85.

26. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreements]; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

often used in such a manner by claimants, defendants, and by other decisionmakers.[27] Most agree that cases decided by international tribunals, especially the ICJ, do in fact contain "a law-creating element"—"If a judgment, especially of the highest court, has pronounced legal rules and principles, legal certainty requires adherence to these rules and principles in other cases, unless compelling reasons militate in favour of changing the case law."[28]

B. THE WTO DISPUTE SETTLEMENT BODY

The GATT, created in the aftermath of the Second World War to govern the world trading system, contained a dispute settlement mechanism often characterized as "power-based."[29] Individual countries could block the adoption of the reports of any dispute settlement panel, and powerful states were frequently wont to do so. The WTO Dispute Settlement Understanding (DSU) established a more judicialized dispute settlement process.[30] Now, when a state party to the WTO challenges the implementation of the WTO agreements by another state party, a panel, drawn from a roster of judges, is convened to hear the dispute. States can challenge a panel's findings before an appellate body. The existence of an appellate body has improved the WTO's prestige and enhanced the predictability of its decision making.

The WTO Dispute Settlement Body has limited jurisdictional reach; it hears only disputes about the implementation by states of the WTO agreements. Only state parties may bring disputes to the WTO, although private parties often play significant roles in assisting their governments to present the cases.[31] The WTO gives only the prospective relief of ordering a state to conform its actions to its WTO obligations.[32]

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27. *See* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 107–10 (1996) (noting that the exclusion of *stare decisis* does not exclude decisions of the ICJ from having precedential force). The same is true of decisions made by other bodies, although their reach is often limited by context. *See, e.g.*, Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as* Jurisprudence Constante, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE (Colin Picker et al. eds., Hart Publishing, forthcoming 2008); Raj Bhala, *The Myth About* Stare Decisis *and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 849–932 (1999) (discussing the *de facto* precedential value accorded to GATT panels and WTO panel and appellate body decisions).

28. THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1244–45 (Andreas Zimmermann et al. eds., 2006).

29. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 112–17 (2d ed. 1997).

30. Donald McRae, *What is the Future of WTO Dispute Settlement?*, 7 J. INT'L ECON. L. 3, 7–8 (2004).

31. GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 19–64 (2003).

32. Christopher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 NW. J. INT'L. L. & BUS. 49, 71 (1997) (describing compensation as prospective relief in the WTO); Carlos M. Vasquez & John H. Jackson, *Some Reflections on Compliance with WTO Dispute Settlement Decisions*, 33 LAW & POL'Y INT'L BUS. 555, 560 (2002).

C. REGIONAL DISPUTE SETTLEMENT BODIES

The WTO permits its members to form preferential trading blocs notwithstanding their obligations to provide most-favored-nation status to all other WTO parties—hence the existence of the European Union, the North American Free Trade Agreement (NAFTA), Mercosur, and the like. Not all believe such preferential blocs are effective or desirable. Jagdish Bhagwati, writing in 1995, characterized the rise in preferential trade agreements as a "spaghetti bowl" phenomenon that "clutters up trade with discrimination depending on the 'nationality' of a good, with inevitable costs that experts have long since noted."[33]

Many trading blocs have dispute settlement mechanisms that duplicate the jurisdiction of the WTO Dispute Settlement Body.[34] NAFTA Chapter 19 is somewhat unusual. It focuses on trade matters, and provides for the establishment of binational panels to review the final decisions of each Party's administrative authorities with respect to the imposition of antidumping or countervailing duty measures.[35] The binational panels act in lieu of municipal judicial authorities; they review administrative procedures for conformance with the municipal laws of the state imposing duties, rather than for conformance with international law. The panel review is started by a request from the NAFTA Party whose exports have been subject to duty. In that respect, it might be described as a traditional state-to-state proceeding.

> All parties who would have been able to appear before a court had the review proceeded through a national courts system . . . may appear before the Chapter 19 binational panel . . . . Thus, the procedure itself is neither wholly state-to-state nor wholly investor-state; it might best be described as *sui generis*.[36]

NAFTA Chapter 19 panels can only remand to the administrative authorities for reconsideration of their earlier decisions in light of the panel's determination. The United States has not included similar tribunals in its other free trade agreements; neither has Mexico or Canada.

Some regional bodies are primarily concerned with trade, while others have a different focus. The European Court of Justice has broad jurisdiction to consider cases brought by member states and nationals of those states, and also by the European Commission. The European

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33. JAGDISH BHAGWATI & ANNE O. KRUEGER, THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 2–3 (1995).

34. Joost Pauwelyn, *Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions*, 13 MINN. J. GLOBAL TRADE 231, 302 (2004).

35. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1904, Dec. 17, 1992, 32 I.L.M. 605 (2003) [hereinafter NAFTA].

36. KINNEAR ET AL., *supra* note 13, General Section-37.

Court of Justice supervises the application of European Union law by the member states. It also supervises the European Union's institutions. The European Court of Justice ordinarily either validates or invalidates an official act, and does not usually order the payment of money damages, although it has the authority to do so.[37]

Human Rights courts are also potential venues for claims that might also be heard in trade or investment tribunals. For example, the European Convention on Human Rights provides property protections.[38] Though these are often more watered-down than those in investment treaties, the European Court of Human Rights is well-established and effective, and is thus an attractive venue. The Inter-American Convention on Human Rights offers similar protections and could be an attractive venue for such cases. Although their enforcement mechanisms are similar, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, have not been as active as the European Court of Human Rights,[39] which has heard a number of expropriation cases.[40] Furthermore, economic law cases are not solely about property ownership; matters of due process before administrative bodies or courts may also be at issue. Human rights courts are eminently well suited to hear such cases. Individuals may bring cases against state parties to the European Convention, and the court may order damages as well as declaratory relief.[41]

D. Investor-State Arbitration

Arbitration between states and individuals is an offshoot of private international dispute resolution—the contract-based establishment of tribunals convened to hear commercial disputes. Individuals and corporations involved in cross-border transactions not surprisingly have wanted dispute resolution before neutral decision-makers and a minimum of jurisdictional wrangling. The growth of international arbitration has been facilitated enormously by the widespread adoption of the New York Convention on the Recognition and Enforcement of

37. For example, the European Court of Justice ordered Greece to pay a fine for its continued failure to comply with a prior court decision. Case C-387/97, Comm'n v. Greece, 2000 E.C.R. I-5047.

38. First Protocol to the European Convention on Human Rights, art. 1, Mar. 20, 1952, 262 U.N.T.S. 221.

39. One interesting example is a case concerning the land rights of the indigenous community of Nicaragua and its demand for formal incorporation into the national land title system. The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at 987 (Aug. 31, 2001).

40. *See, e.g.*, Sporrong & Lönnroth v. Sweden, 52 Eur. Ct. H.R. 4 (1983) (finding Swedish government's issuance of long-term expropriation permits and prohibitions on construction deprived the owners of their use of property in violation of the Convention because the owners bore an individual and excessive burden when compared to the general interests of the community).

41. Eleventh Protocol for the Protection of Human Rights and Fundamental Freedoms art. 34, May 11, 1994, Europ. T.S. No. 155.

Arbitral Awards, a treaty that permits a party to an arbitration to enlist the coercive powers of national courts to enforce an arbitral award in his favor.[42]

Foreign investors are able to protect themselves and their investments in various ways. For example, they can and do negotiate contracts with host states that contain arbitration provisions. These contracts can either establish an entirely *ad hoc* arbitral body, or they can refer the disputing parties to dispute settlement under the auspices of the International Centre for Settlement of Investement Disputes ("ICSID") Convention when both the host state of the investor and the host state are party to the ICSID Convention.[43] The law governing these contract-based arbitrations is usually stipulated in the contract and is often municipal law, although the parties could agree to have their dispute governed by international law.

Individually negotiated arbitration agreements are not, however, the only way for investors to submit disputes against host states to arbitration. There is now a network of more than 2,400 investment treaties, most of which contain investor-state dispute settlement provisions.[44] These investment treaties may be said to involve standing offers to submit disputes to arbitration in the event certain conditions are satisfied. When the conditions precedent to arbitration are satisfied, an investor may accept the offer to submit the dispute to arbitration. These tribunals are hybrids in that they involve both states and private claimants. Moreover, they typically use private international law rules to resolve disputes whose foundation is usually in public international law.

Investors from a state that has an investment treaty with a host state may invoke the protections of the treaty. The substantive treaty protections set forth the obligations that a state has undertaken with respect to investments from the home state. These protections typically include an obligation to afford national treatment, most-favored-nation

42. Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. As of 2007, there were 142 signatories to the New York Convention. U.N. Comm'n Int'l Trade Law, Status 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Nov. 22, 2007).

43. The ICSID was established by convention under the auspices of the World Bank. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. The purpose of the ICSID Convention was to establish a "mechanism for the orderly settlement of disputes" that would "improve a country's investment climate" and "have a moderating influence on the parties' conduct." CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY xvii (2001). ICSID Convention arbitration is available for the resolution of investment disputes when both the state hosting the investment and the home state of the investor are party to the Convention. *Id.* at 6.

44. U.N. CONFERENCE ON TRADE & DEV., DEVELOPMENTS IN INTERNATIONAL INVESTMENT AGREEMENTS IN 2005, at 2, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/7 (2006), *available at* http://www.unctad.org/en/docs/webiteiia20067_en.pdf.

treatment, and the minimum standard of treatment under international law, including fair and equitable treatment and full protection and security. Host states also pledge not to impose performance requirements, to permit the repatriation of profits, and not to expropriate property without payment of due compensation. But it is the ability to submit disputes to arbitration that is generally considered especially valuable to investors. Investors may submit cases to arbitration directly; they do not need to seek espousal by their home states. Moreover, the relief given by investment treaty tribunals is usually the award of money damages payable to the investor. Taken together, the above advantages suggest why investment treaty dispute resolution is so popular.[45]

E. MUNICIPAL COURTS

Focusing only on international tribunals would not give adequate recognition to the role that municipal courts have played and will continue to play in foreign investors' search for recompense. Municipal courts, usually in the host state, are the most obvious and likely the most frequently used venues for settlement of disputes between foreign investors and host governments. However, there are no data on the number of disputes involving foreign investors that are finally resolved by local courts. Certain municipal courts, notably those in London, are particularly apt to hear international commercial disputes.[46]

Despite their apparent convenience, local courts in a host country may be unattractive for a number of reasons. First, there may be questions of sovereign immunity. In the United States, for example, the federal government and the states retain their immunity for a number of types of acts, including intentional torts.[47] Since many other nations have abrogated their sovereign immunity, though, it will not pose an insurmountable hurdle in most cases.[48]

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45. The number of treaty-based disputes has risen substantially over the past several years; claims brought before the World Bank's ICSID rose from 3 as of the end of 1994, to 132 as of November 2005. U.N. CONFERENCE ON TRADE & DEV., INVESTOR STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW, at 4, Pub. No. UNCTAD/ITE/IIT/2005/4. The U.N. Conference on Trade and Development (UNCTAD) also notes at least eighty-seven cases outside the auspices of the ICSID. *Id.* at 4–5. Thus, the total number of cases is about 219, over half of which have been filed within the past four years. *Id.*

46. *See, e.g.*, Hein Kötz, *The Common Core of European Private Law: Presented at the Third General Meeting of the Trento Project*, 21 HASTINGS INT'L & COMP. L. REV. 803, 806 ("'The English Commercial Court itself . . . must, I imagine, be by far the most important court in the world for the resolution of international commercial disputes. Certainly there is nothing like it anywhere else in Europe. You can judge its international character by the fact that, in one year during which I had the honor to preside over the court, in every single case tried in the court either one or both parties came from overseas.'" (quoting Lord Goff)).

47. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2674 (2006).

48. Gyula Eorsi, *Private and Governmental Liability for the Torts of Employees and Organs*, *in* 11

In a nation state in which the independence of the judiciary is questionable, foreign investors may fear that the government's position is likely to be favored.[49] Foreign investors may suspect bias against outsiders even when the judiciary is considered independent.[50]

Municipal courts in the home state of the investor will often be unavailable either for lack of jurisdiction over the host state, or because foreign sovereign immunity protects the host government. All the western European nations, and many beyond, have adopted the restrictive theory of sovereign immunity, holding that foreign governments do not enjoy immunity when they are acting *jure gestionis* (in a private capacity), but that they retain immunity when acting *jure imperii* (in a public capacity).[51] The United States followed the lead of the European countries and codified the restrictive theory of immunity in the Foreign Sovereign Immunities Act of 1976.[52] In the investor-state dispute settlement context, foreign states sometimes act in a private capacity, but very often act in a public capacity as they enact a government measure with deleterious effects on a foreign investor or his investment.

In rare circumstances a foreign investor may seek relief in the courts of a third state—one that is neither the home nor the host state. First, it might be difficult to say which is the home state when an investment is controlled by one corporation that is in turn held by another corporate entity (or entities). In such a case, there may effectively be more than

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INT'L ENCYCLOPEDIA COMP. L. ch. 4, paras. 172–73 (André Tunc ed., 1975).

49. These concerns are not new; they led to the negotiation of the International Convention on Settlement of Investment Disputes. ICSID Convention, *supra* note 43.

50. A recent study of foreign corporate defendants in U.S. courts suggests that they are more likely to lose cases than are U.S. corporate defendants. Utpal Bhattacharya et al., *The Homecourt Advantage in International Corporate Litigation*, J.L. & ECON. (forthcoming Nov. 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=509008. The authors noted that bias is not the only reason for the disparate results, although they suggest that structural reasons, such as foreign firms having less familiarity with and less skill in dealing with the U.S. justice system, were unlikely to be important explanations. *Id.* (manuscript at 29). This study does not address situations where the plaintiffs are corporations, nor does it look at cases in which government, whether local or national, is the opposing party. The history of state responsibility for injuries to aliens, however, is replete with examples of bias in the courts. *See* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005); Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 838–47 (2005). For a cogent and convincing analysis of U.S. constitutional issues implicated by Congress's authorization of international tribunal jurisdiction, see Henry P. Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007).

51. *See* Ian Sinclair, *The Law of Sovereign Immunity. Recent Developments*, 167 RECUEIL DES COURS 113, 121–46 (1980) (Neth.); Jean-Flavien Lalive, *L'immunite de Jurisdiction des Etats et des Organisations Internationales*, 84 RECUEIL DES COURS 209, 215 (1953) (Neth.).

52. United States Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602, 1605 (2006); *see also* A.F.M. Maniruzzaman, *State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends*, DISP. RES. J., Aug.-Oct. 2005, at 76 (discussing immunity of state-owned enterprises, as well as states themselves).

one home state.[53] A third state may also have jurisdiction due to complexities of corporate ownership structure. Claimants, assisted by expansive jurisdictional reach in some countries such as the United States, can be inventive in the ways in which they bring cases. One recent example involves the Yukos Oil Company, a Russian-based multinational conglomerate whose assets were seized by Russian authorities, allegedly in response to fraud and tax evasion by Yukos's principal, Mikhail Khodorkovsky.[54] The Russian authorities put up for auction stock in one company responsible for managing 60% of the production of the Yukos Group (the average daily output of the group was more than 1.6 million barrels in 2003).[55] In an attempt to stop the auction, managers of Yukos filed a voluntary bankruptcy petition in Houston, Texas and asked the court to issue a temporary restraining order against the auction in order to protect the bankruptcy estate.[56] The court determined it had jurisdiction to administer the bankruptcy on several grounds, including the fact that a substantial portion of Yukos stock was owned by U.S. investors.[57] The court accordingly issued a stay, but the Russian Government held the auction as scheduled notwithstanding the Houston court's order.[58] Soon thereafter, the Houston court dismissed the case "for cause."[59] Although it did not specify the exact reason for the dismissal, the decision cited, *inter alia*, bad faith, *forum non conveniens*, comity, and the act of state doctrine.[60] These reasons underscore the reluctance a third-state court might have in exercising jurisdiction over a case with at most an attenuated connection to the forum.

A disincentive to seeking relief in municipal courts is that governing law will usually be national law. In situations in which municipal law would be unlikely to grant relief, investors might prefer an international tribunal in which they could allege violations of international law. In some states it might be possible to bring a claim based on international law; courts of countries in which investment treaties have direct effect,

53. *See, e.g.*, *infra* Part III.C & III.D (discussing *Lauder* cases).

54. Matteo M. Winkler, *Arbitration Without Privity and Russian Oil: The Yukos Case Before the Houston Court*, 27 U. PA. J. INT'L ECON. L. 115, 115–17 (2006).

55. *Id.* at 116–17.

56. *In re* Yukos Oil Co., 321 B.R. 396, 399 (Bankr. S.D. Tex. 2005).

57. Yukos Oil Co. v. Russian Federation, 320 B.R. 130, 132 (Bankr. S.D. Tex. 2004).

58. Winkler, *supra* note 54, at 120.

59. *In re* Yukos Oil Co., 321 B.R. at 410–11.

60. *See* Deutsche Bank AG's Motion to Dismiss Chapter 11 Bankruptcy Case at 9–19, *In re* Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (No. 04-47742). The Yukos dispute did not end there; Yukos also sought to compel arbitration with the Russian Government under Russia's foreign investment laws. Winkler, *supra* note 54, at 121–26. Other investors in Yukos whose home states have investment treaties with Russia suggest they will initiate arbitration under those treaties. *See* W. Ben Hamida, *L'Arbitrage Transnational Face a Un Desordre Procedural: La Concurrence Des Procedures Et Les Conflits De Juridictions*, 3 TRANSNAT'L DISPUTE MGMT. paras. 60–61 (Mar. 2006).

for example, have jurisdiction to consider claims based on those treaties.[61] Even then local political pressures might make it difficult for a judge to decide that a governmental measure comported with local law but violated international law.

II. FRAGMENTATION AND DUPLICATION OF TRIBUNAL AUTHORITY

A superficial glance at the multiplicity of mechanisms apparently available for the resolution of international economic disputes suggests that states have favored investors by establishing many, varied options for dispute settlement. A closer examination, however, reveals a more complex picture, characterized by fragmentation and duplication. Duplication and fragmentation are essentially two sides of the same coin; multiple tribunals whose authority extends to hearing cases arising from the same complex dispute may have some overlapping powers and some divergent powers. Thus, a given dispute can offer elements of both fragmentation and duplication.

This Part presents a general description of these two problems. Part III sets out two recent, graphic cases involving elements of fragmentation and duplication in order to illustrate concretely the need for a solution to these pressing problems. A preliminary point is that fragmentation and even duplication are not inherently bad; each can potentially bring benefits, such as the establishment of tribunals with deliberately limited competences and highly specialized decision makers.[62] Indeed, Professor Charney has suggested that the existence of multiple tribunals will eventually strengthen the ICJ and the rule of international law.[63]

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61. Most civil law countries follow a monistic theory of international law, which makes international law, and international treaties, an integral part of their legal system. Mexico, for example, had to provide especially for this possibility in the NAFTA by requiring investors to assert NAFTA claims either in Mexican courts or before international arbitral tribunals, but not both. NAFTA, *supra* note 35, Annex 1120.1. Most common law countries subscribe to the dualist view, which holds international law to be separate from domestic law until expressly incorporated into the domestic legal order.

62. *See* Int'l Law Comm'n, Report of the Study Group on Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682 (Apr. 4, 2006) (*prepared by* Martti Koskenniemi) (noting both positive and negative sides) [hereinafter ILC Fragmentation Report]; Buergenthal, *supra* note 14, at 497 ("[T]he proliferation of international courts is, on the whole, good for international law."); Charney, *Impact*, *supra* note 12, at 698–99 (noting features that make disparate tribunals attractive, such as the special qualities of panel members). Other potential benefits include procedures that may vary from those established by the ICJ, or by other tribunals, such as secrecy, rules about intervention, and official language. Charney, *Is International Law Threatened?*, *supra* note 12, at 133.

63. Charney, *Is International Law Threatened?*, *supra* note 12, at 135; *see also* SHANY, *supra* note 5, at 78 (noting potential for encouragement of international law). Judge Higgins has noted approvingly the growing strength and number of tribunals, and suggests that judicial bodies be fashioned to reflect the purpose they serve, and that regional bodies are a good way to minimize intrusions into sovereignty so long as the political and cultural ethos of the region encourage their formation. Roslyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 INT'L & COMP.

There is a danger in placing too great a burden on an international dispute settlement regime when, in fact, disaggregation of responsibility among dispute settlement bodies, including those housed in administrative agencies, is often the norm in municipal law as well. Specialized tribunals or agencies decide matters that have been entrusted to them.[64] One should be wary of demanding from international tribunals a greater coherence than one demands of municipal tribunals.[65] One of the difficulties, however, is that on the international plane there is no hierarchical structure linking the tribunals and encouraging their interaction.[66]

Yet the problematic aspects of fragmentation and duplication have captured the attention of commentators. Parallel and successive arbitral proceedings "have been controversial and, for some commentators and academics, portend a gathering crisis in the global system of international arbitration."[67] The fragmentation of responsibilities among international tribunals may "threaten[] the coherence of the international legal system"[68] and "create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices."[69]

Whether these somewhat dire predictions will be confirmed remains to be seen. At the least, however, complex economic transactions often involving multiple actors in multiple countries transcend the boundaries between dispute settlement regimes in a manner that necessitates some coordination. Barriers to such coordination are rooted in the traditional public international law doctrines centering on the nation-state as the primary actor on the international stage. These doctrines tend to magnify problems of fragmentation and to minimize problems of duplication, although the perceptions of the illegitimacy tied to duplicative proceedings will often persist. Part C, below, examines the status of

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L.Q. 1, 12–15 (2003). The strong networks that grow around a particular treaty may also have the effect of strengthening the tribunal that adjudicates claims brought under that treaty. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 367–68 (1997) (noting the community of law that grows around a particular tribunal and contributes to its effectiveness).

64. *See, e.g.*, Hamida, *supra* note 60, para. 20 (discussing the fact that different French tribunals are entrusted with deciding issues concerning the civil code and the commercial code).

65. I am grateful to Lucy Reed for suggesting that people often have greater expectations of international tribunals that they do of municipal tribunals.

66. *See, e.g.*, Higgins, *supra* note 63, at 12 (noting a "largely horizontal legal order" in which the ECJ is a "partial exception").

67. David W. Rivkin, *The Impact of Parallel and Successive Proceedings on the Enforcement of Arbitral Awards*, *in* DOSSIERS: PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION 269, 269 (Bernardo M. Cremades & Julian D.M. Lew eds., 2005).

68. Charney, *Impact*, *supra* note 12, at 699.

69. ILC Fragmentation Report, *supra* note 62, at 14. Jenny Martinez has suggested ways to combat fragmentation, including a recommendation that international tribunals adopt system-conforming, prodialogic rules to ensure better cooperation among them. *See* Martinez, *supra* note 12, at 477–82.

individuals in international law and how perceptions about that status affect the role individuals play in international proceedings. It also delves into the conceptual distinctions between injuries to individuals and injuries to their home states, and the effect such distinctions have on the potential for double recovery.

A. DUPLICATION

Before undertaking a systematic analysis of duplicative proceedings and comparing them to fragmented proceedings, we must pause to discuss how to categorize proceedings as duplicative or fragmented. Relevant considerations are the identity of the parties, the applicable law, and the nature of the available relief. The first two criteria are contained in the principles of *lis pendens* and *res judicata.* They determine when a concurrent parallel proceeding should be suspended and when a completed proceeding ought to preclude the prosecution of a case in a subsequent tribunal.[70] The third element—available relief that appears to be or is duplicative—may be the most important, at least insofar as perceptions of fairness and legitimacy are concerned.

Concerns about the potential for duplicative relief permeate the literature about forum shopping in municipal courts.[71] Many international tribunals have overlapping jurisdictions, leading to parallel or sequential proceedings in which the objective is duplicative or substantially similar relief. As Yuval Shany has written: "[J]urisdictional conflicts between different international courts and tribunals (and quasi-judicial procedures) are not only possible, but are a real and inevitable phenomenon."[72] The infamous investor-state cases involving Ronald Lauder—one involving Lauder himself submitting a claim to arbitration against the Czech Republic under the U.S.-Czech Republic bilateral

70. The first two criteria are the ones usually necessary to establish *res judicata* in a subsequent proceeding. *See* The Pious Fund of the Californias (U.S. v. Mex.) Hague Ct. Rep. (Scott) 1, 5 (Perm. Ct. Arb. 1902), *reprinted in* 2 AM. J. INT'L L. 893 (1908). For a discussion of *lis pendens*, see Douglas D. Reichert, *Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and International Arbitration*, 8 ARB. INT'L 237 (1992).

71. *See, e.g.*, Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 337 (2005) ("Critics of forum shopping charge manipulation, wrongdoing, and abuse by lawyers (invariably plaintiffs' lawyers) to obtain a forum and substantive law to which they are not entitled."); Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 307 (1996) (suggesting the need for measures to deter lawyers from engaging in forum shopping). These concerns also exist in transnational cases. *See* N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 608–09 (2006) ("[T]he battle for where litigation is to take place may often be the most important and bitterly fought issue in a transnational case."); Douglas, *supra* note 10, at 236 ("Forum shoppers of the future will be less concerned with the remedial possibilities in proceedings before the domestic courts of different states, but will instead seek advantage from the absence of hierarchy and coordination among the various types of international tribunals").

72. SHANY, *supra* note 5, at 73.

investment treaty (BIT),[73] the second involving Lauder's Dutch subsidiary submitting a claim to arbitration under the Netherlands-Czech Republic BIT[74]—sparked similar comments.[75]

The concerns about duplication are similar both municipally and internationally. Duplicative filings can lead to inefficiency of process as disputes arising from the same underlying facts are re-litigated or re-arbitrated at great time and expense. The legitimacy of the dispute settlement system or systems may also be undermined because of the perception that claimants have too many places in which they can seek relief. There is a risk that tribunals will come to inconsistent decisions about liability and/or the payment of damages. Two problems arise from inconsistent decisions: one is the practical problem of reconciling the two disparate decisions in other tribunals later called upon to enforce the awards; the second is the philosophical problem that the legitimacy of the dispute settlement bodies at issue is compromised because of the inconsistent outcomes.[76] To make matters worse, there is the possibility that a claimant will get duplicative recovery, an outcome suggesting substantive unfairness in the process itself.

B. FRAGMENTATION

Analyzing the parties, the cause of action, and the relief available suggests that international dispute resolution is more often characterized by fragmentation than by duplication. Fragmentation occurs when related parties must go to different venues to get relief, when different tribunals have the authority to apply law that addresses only one aspect of a dispute, or when tribunals can give only limited and non-duplicative forms of relief. Again the third element may be the most important

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73. Lauder v. The Czech Republic, UNCITRAL, Final Award (Sept. 3, 2001), *available at* http://ita.law.uvic.ca/documents/LauderAward.pdf.

74. CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award (Mar. 14, 2003), *available at* http://ita.law.uvic.ca/documents/CME_Schreuer_quantum.pdf.

75. *See* Charles N. Brower & Jeremy K. Sharpe, *Multiple and Conflicting International Arbitral Awards*, 4 J. WORLD INVESTMENT 211, 215–16 (2003) (quoting counsel for the Czech Republic as describing the situation as "absolutely ludicrous, and highly regrettable for the fact that it makes the law look so stupid"); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1559–68 (2005); Charles N. Brower, *A Crisis of Legitimacy*, NAT'L L.J., Oct. 7, 2002, at B1; Michael Goldhaber, *Czechmate*, AM. LAW., Mar. 2002, at 82.

76. *See* August Reinisch, *The Use and Limits of* Res Judicata *and* Lis Pendens *as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 L. & PRAC. INT'L CTS. & TRIBUNALS 37, 39 (2004) ("While divergent interpretations of international law by different dispute settlement institutions may be an unfortunate development, the matter even deteriorates where different tribunals reach not only divergent but even contradictory conclusions and where such incompatible judgements [sic] concern the same factual background."); Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, TRANSNAT'L DISP. MGMT., Apr. 2006, at 1, 18 ("[T]he problem of conflicting awards is a reality and has led to a discussion on how to address the problem.").

insofar as concerns about fairness and abuse of process are concerned.

The problem of fragmentation in international law is a threat to the viability of international law.[77] Up to now, most scholarship has focused on fragmentation in the formation of customary international law and the interrelationship of principles developed in closed systems of law related to particular treaties.[78] It has not examined fragmentation in the disputes settlement options themselves or its effect on the dispute settlement bodies and the parties before them.

The occurrence of fragmentation is not surprising. First, many international tribunals were created to hear disputes in what are essentially closed legal systems.[79] Most international tribunals are tied to a treaty and have jurisdiction limited to disputes arising under that treaty.[80] This has led to the development of discrete legal systems between which there is limited interaction.[81] Thus, different tribunals tend to hear disputes arising under different treaties, even when those disputes might arise from related or even identical transactions.

Second, traditional views of the roles of the state and the individual in international law push towards fragmentation. The rigid distinctions between states and individual claimants that are the legacy of the Westphalian tradition of public international law are reflected in many institutions.[82] Thus, while investors have more rights before international tribunals than they previously had, they still often lack standing. The applicable law in various tribunals differs, and frequently tribunals have authority to grant only limited forms of relief. These limitations

77. *See generally* ILC Fragmentation Report, *supra* note 62; Charney, *Is International Law Threatened?*, *supra* note 12.

78. *See generally* ILC Fragmentation Report, *supra* note 62; Charney, *Is International Law Threatened?*, *supra* note 12.

79. *See* C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 403 (1953) ("[L]aw-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respect analogous to those of separate systems of municipal law.").

80. Thus, for example, the WTO dispute settlement system is charged to "preserve the rights and obligation of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, Dec. 15, 1993, 33 I.L.M. 112, 115 (1994) [hereinafter DSU].

81. Charney, *Is International Law Threatened?*, *supra* note 12, at 130 (noting specialized tribunals' tendency to cite to Permanent Court of International Justice and ICJ awards but less to the awards of other tribunals).

82. The 1648 Treaty of Westphalia is usually credited with ushering in an international legal order deriving its authority from the nation state; it also established that nation states had absolute sovereignty over their territory and were to be treated as equals in the international order. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57–58 (6th ed. 2003). For an historical and contextual account of the Peace of Westphalia, see PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY 501–19 (2002).

encourage filing before multiple tribunals.

Fragmentation may not give rise to the double-dipping problems posed by duplicative processes. It may nonetheless be wasteful in the sense that parties must duplicate their efforts in different fora. It may also give rise to perceptions of illegitimate use of dispute resolution processes insofar as technical distinctions between parties, causes of action, or relief sought are not highlighted in media reports or public commentary. Rather, such technicalities are usually obscured behind broad-brushed descriptions of disputes that highlight the apparent abuse of process when the same dispute is heard before multiple tribunals.

C. THE EFFECT OF PUBLIC INTERNATIONAL LAW PRINCIPLES

Traditional public international law principles did not allow room for non-state actors.[83] Private international law dealt with the transnational relationships between private entities.[84] Private international law was in fact the municipal law that a state developed to manage cross-border transactions and relationships.[85] In that sense, it was not "international law" at all.

The dichotomy between the private and the public[86] may have made more sense in a world governed by a strong Westphalian tradition in which states were the only actors empowered to assert rights under or seek the protections of public international law. But the state is no longer the only actor on the global stage.[87] The "transnational law" presciently discussed by Judge Philip Jessup is an increasingly common feature of

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83. *See* BROWNLIE, *supra* note 82, at 57–61.

84. DICEY AND MORRIS ON THE CONFLICT OF LAWS 1, 32 (Lawrence Collins et al. eds., 13th ed. 2000) (discussing nature and scope of conflict of laws).

85. GEORGE GRAFTON WILSON, INTERNATIONAL LAW 4 (9th ed. 1935) ("Private international law . . . treats of the rules and principles which are observed in cases of conflict of jurisdiction in regard to private rights. These cases are not strictly international, and a better term for this branch of knowledge is that given by Judge Story, 'The Conflict of Laws.'"). This distinction was always in some sense overdrawn: private actors were affected by public international law even at the height of the Westphalian order.

86. The oft-misleading taxonomy "public" law and "private" law exists in municipal law as well. For discussions of the public/private distinction generally, see Peter Cane, *The Anatomy of Private Law Theory: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 203, 212–14 (2005) (discussing the philosophical bases for distinguishing public and private law), and Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267, 267–72 (1986) (discussing the relationship between the public/private law distinction and legal regulation). *See also* James A.R. Nafziger, *Transnational Dispute Resolution: Bringing It All Together—An Introduction*, 8 WILLAMETTE J. INT'L & DISP. RESOL. 1, 2–3 (2000) (noting a blurring of authority between the "private" and "public," and between the "domestic" and "international").

87. "[I]t is now well established that the individual is a subject of international law, though not in all the same respects as states and international organizations." M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541, 548 (2006). *See generally* ALVAREZ, INTERNATIONAL ORGANIZATIONS, *supra* note 12 (discussing role of international organizations in the formation and application of international law).

modern life.[88] Dean Harold Koh has described a transnational legal process that "is nonstatist: the actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well."[89] Dean Anne-Marie Slaughter has described a disaggregated world order characterized by regulatory, judicial, and legislative government networks and non-governmental networks that interact with each other both formally and informally.[90]

As the foregoing demonstrates, today's global legal order is pluralistic.[91] Non-state actors play formal roles before many dispute settlement tribunals. No longer are they only "objects" of international law.[92] The essential problem, however, is that substantive international law has not kept pace with this recognition of non-state actors as having status before international tribunals. Most international law was formulated for application in a world in which states were the only actors. Obligations understood as obtaining between states may transfer uneasily to obligations obtaining between states and private individuals.[93] The formerly entrenched view was that individuals have status on the international plane only derivative of their protecting states. That view leads to the conclusion that international disputes involving claimants with different nationalities effectively involve disputes with different states, notwithstanding any corporate or other relationship between the claimants. This conclusion encourages fragmenting disputes arising from the same or related factual bases and limiting the possibility for their coordination. The more flexible view that claimants have rights of their own, while potentially diminishing the fragmentation of disputes, poses other interpretive problems, such as whether claimants have the authority to waive those rights if they so choose.

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88. *See* PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956). Jessup uses the term "transnational law" to include "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included as are other rules which do not wholly fit into such standard categories." *Id.*

89. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996).

90. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 2–4 (2004).

91. Ten years ago Dean Slaughter noted the disaggregation of the State, and the corresponding rise in state functions being performed by private parties acting together through a web of international networks. *See, e.g.*, Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, at 183.

92. For an interesting historical perspective on the role of individuals in the pre-Westphalian order, see David. J. Bederman, *World Law Transcendent*, 54 EMORY L.J. 53, 67–69 (2005) (noting corporatist features of medieval canon law and drawing parallels between the role of NGOs and international organizations to the role of the Catholic church prior to Westphalia).

93. The International Law Commission's State Responsibility Articles leave open the possibility that individuals may play a role in international disputes, but do not address the matter directly. Article 33 provides: "This Part [on the scope of international obligations] is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a state." U.N. Int'l Law Comm'n, Report on the Work of its Fifty-Third Session, art. 33, U.N. Doc. A/56/10 (2001); *accord* Douglas, *supra* note 10, at 188.

1. Identity of the Parties

When states alone had identity in international law, only states could be the parties to international disputes. In most international tribunals, then, states sought damages or redress for injuries done to the state itself. Sometimes, though, the state actually sought redress for injury done to one of its nationals. This led to the establishment of the principle of diplomatic protection or espousal—the legal fiction that an injury to a state's national was an injury to the state itself.[94] Alternatively, the home state of a national could bring claims alleging direct injury to the state—the favorable resolution of which would also redound to the benefit of the private entities.

States are still the most usual claimants in international tribunals, although some tribunals permit limited informal participation by non-governmental entities.[95] In the economic law realm, though, private entities, both individual and corporate, have in many circumstances the right and the ability to bring claims on their own behalf.[96] In fact, investors can not only choose which forum they prefer, but also may bring their claims simultaneously, or sequentially, in those different tribunals.[97]

In most instances individuals have rights to bring their own claims before international tribunals because states have conferred those rights on them by treaty.[98] This most commonly happens under BITs, in which the state parties negotiate special protections for foreign investors, including the ability of those foreign investors to vindicate their claims

94. Bjorklund, *supra* note 50, at 821–25.

95. The WTO Appellate Body has held that it had the authority to consider *amicus curiae*-type submissions from non-governmental organizations in certain circumstances. The member states, however, disapproved of the Appellate Body's conclusion, and the WTO dispute settlement bodies have not revisited the issue. Article 16.1 of the DSU makes clear that any ruling under that provision sets forth procedures for that case only; a majority of WTO members have yet to acquiesce in the panel and appellate body rulings permitting amicus submissions. *See* WTO General Counsel, Minutes of Meeting Nov. 22, 2000, WT/GC/M/60 (Jan. 23, 2001).

96. These rights are conferred usually by investment treaties, whether multilateral or bilateral. U.N. CONFERENCE ON TRADE & DEV., INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES: VOLUME II, at 17–20, U.N. Doc. UNCTAD/ITE/IIT/2004/10 (2004).

97. *See, e.g.*, Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTRALIAN Y.B. INT'L L. 191, 191 (1999); Joost Pauwelyn, *Editorial Comment: Adding Sweeteners to Softwood Lumber: the WTO-NAFTA 'Spaghetti Bowl' is Cooking*, 9 J. INT'L ECON. L. 197, 200–02 (2006); Reinisch, *supra* note 76, at 37–38 (2004); Christer Söderlund, Lis Pendens, Res Judicata *and the Issue of Parallel Judicial Proceedings*, 22 J. INT'L ARB. 301, 304–05 (2005); Katia Yannaca-Small, *Parallel Proceedings*, *in* OXFORD HANDBOOK OF FOREIGN INVESTMENT LAW (Peter Muchlinski et al. eds., Oxford U. Press, forthcoming 2008).

98. When private entities enter into state contracts that contain arbitration clauses with the host government, they do so without the intermediary action of their home government, and are then direct beneficiaries of those agreements. To the extent that the contract refers to arbitration under the ICSID Convention, however, some of the rights may more properly be viewed as conferred on the individuals by the state.

before *ad hoc* international arbitral tribunals. This conferral can be viewed in two different ways: first, as a kind of "delegated espousal," and second, as individuals becoming third-party contract beneficiaries of the treaties, with all of the rights pertaining thereto. The two approaches are described below, followed by an exploration of the differing ramifications of each for the duplication and fragmentation of proceedings.

a. Delegated Espousal

The "delegated espousal" model builds on the traditional view that states are the only proper subjects of international law, and treaties "bestow legally enforceable rights only on states, and not directly on individuals."[99] Thus, an injury to a national of the state is an injury to the state itself, for which the state could seek redress under the doctrine of espousal. A state that negotiates the ability for its national to bring a claim on his or her own behalf is thus delegating its espousal capability to its national. This approach is also known as the "derivative rights" model because the individual's rights derive from those of the state.[100]

"Delegated espousal" may seem unduly cumbersome, but it is consistent with the view that states negotiate treaties to confer benefits on themselves, and that a violation of a treaty is an injury to the state.[101] Most investment treaties do not preclude the possibility of espousal; while in most cases an individual will prefer to bring a claim himself, he retains the option of trying to persuade his home state to pursue a claim on his behalf.[102] Finally, states retain the power to withdraw from treaties.[103] In that respect, they would seem still to be the primary actors.

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99. Robert Anderson, IV, *"Ascertained in a Different Way": The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. 189, 243 (2001).

100. *See* Douglas, *supra* note 10, at 162–67; The Loewen Group Inc. v. United States, ICSID (W. Bank), Case No. ARB(AF)/98/3, ¶ 233 (2003) (noting that "claimants are permitted for convenience to enforce what are in origin the rights of Party states").

101. This was the argument always made against the "Calvo" clauses that many Latin American countries insisted be included in contracts between foreign investors and the State. The Argentine jurist Carlos Calvo argued that aliens should be given no better treatment than nationals of a host state; thus, aliens signing a contract with a host government should waive their right to seek diplomatic protection from their home states, as the home state's espousal of its national's claim conferred an extra advantage. DONALD R. SHEA, THE CALVO CLAUSE 3–8 (1955). Aliens signed contracts containing such waivers, but they were held invalid by mixed claims commissions entrusted with resolving later disputes on the grounds that the ability to espouse a claim belonged to the government and could not be waived by an individual. *Id.*

102. Diplomatic protection is often precluded by the terms of the treaty in the event that an individual commences investor-State dispute settlement on its own behalf. In the event the respondent state refuses to cooperate in good faith with the privatized dispute settlement mechanisms, however, an individual may request diplomatic protection.

103. Vienna Convention on the Law of Treaties, arts. 54–64, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

b. Third-Party Beneficiaries

A second possible approach is that, in contract-law terms, individuals who have been granted the ability to submit claims of violations of international law on their own behalf become third-party beneficiaries of the treaties. This has been called the "direct rights" model,[104] but using the third-party beneficiary terminology facilitates a deeper examination of the degree to which rights are conferred.[105]

Third party beneficiaries may enforce a right when doing so is appropriate to effectuate the contracting parties' intention and "'the circumstances indicate that the promisee [the contracting state] intends to give the beneficiary (the foreign citizen) the benefit of the promised performance.'"[106] This is analogous to the treatment in municipal law of those treaties conferring on private individuals the ability to enforce the treaty provisions in the courts of that individual's country.[107]

Little has been written about the possibility of treating individuals as third-party beneficiaries to investment treaties. Some writers, and the Restatement (Third) of the Foreign Relations Law of the United States have recognized that states may be third-party beneficiaries of a treaty, although the extent of the rights conferred is unclear.[108] It has been suggested that individuals have rights under tax treaties, but that the situation is better resolved by granting individuals explicit rights under the treaty, rather than requiring that they rely on implication or status as

104. *See* Douglas, *supra* note 10, at 164. The English Court of Appeal took this approach in reviewing an arbitral award against Ecuador: "'The fundamental assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national State.'" Occidental Exploration and Production Co. v. Republic of Ecuador, [2005] EWCA (Civ) 1116, para. 20; [2005] 2 Q.B. 432, 450 (C.A.) (quoting Douglas, *supra* note 10, at 182).

105. Professor Douglas suggests that there are two alternative direct models: one in which rights are conferred on individuals directly, to the exclusion of the home state; and one in which substantive obligations are owed to the home state, but the right of vindicating those obligations belongs to the investor. Douglas, *supra* note 10, at 181–84. The third-party beneficiary approach I suggest is more consistent with the latter. Douglas did idenitfy his preferred approach. *Id.* at 184.

106. Anderson, *supra* note 99, at 244 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981)) (alteration in original).

107. *See* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2304 (1991).

108. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324 (1987) (stating that an international agreement creates neither rights nor obligations for a third state without its consent; rights or obligations are created only if the parties to the agreement intend to confer the right or establish the obligation and the third state accepts the right or obligation); Anderson, *supra* note 99, at 244; M. Cherif Bassiouni, *supra* note 87; Brilmayer, *supra* note 107, at 2304; George D. Haimbaugh, Jr., *Impact of the Reagan Administration on the Law of the Sea*, 46 WASH. & LEE L. REV. 151, 188 (1989); Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1136 (1992); Rachel Anderson, Note, *Redressing Colonial Genocide Under International Law: The Hereros' Cause of Action Against Germany*, 93 CAL. L. REV. 1155, 1177–79 (2005) (viewing rights of Herero gained under treaty as possibly conferring on them third-party beneficiary rights).

third-party beneficiaries.[109]

A significant benefit of the third-party beneficiary approach is that it is consistent with both the intentions of the states and the language of the treaty provisions that grant individual claimants autonomous rights separate from those of their home states.[110] It acknowledges, however, that home states retain rights under the treaties. The third-party beneficiary approach strips away the fiction that the state is the injured party in favor of a straightforward recognition of the fact that most of the time the injury is done to the claimant. The dispute settlement provisions of BITs permit individual claimants to bring their own claims; claimants also choose how to prosecute their cases and whether or not to settle them. The third-party beneficiary approach also comports with the fact that the obligations in investment treaties are asymmetric; states owe obligations to investors, but investors have no corresponding obligations to states.

c. *The Delegated Espousal and Third-Party Beneficiary Approaches Compared*

Several commentators have suggested that investors do have direct rights under investment treaties, but their commentary has not pressed the extent of those rights. The section below addresses the significance of these distinctions, and analyzes the results of granting investors direct rights. The focus is on three issues, namely treaty withdrawal, pre-dispute waiver of rights, and a post-dispute waiver of rights.

The distinctions between the "delegated espousal" and "third-party" beneficiary approaches are not merely semantic. They relate to the basic question of the relationship between claims under different treaties that may arise from similar events. Take, for example, the hypothetical situation where States A and B each have an investment treaty with State C. State C enacts a measure that allegedly violates customary international law and injures property owned or controlled by claimants (a) and (b) from states A and B. Those claimants subsequently file claims under their respective BITs. If an injury to claimant (a) is conceived as an injury to State A, and an injury arising out of the same cluster of events to claimant (b) is conceptualized as an injury to State B, then one would have to conclude under principles of public international law that the same events result in separate injuries, notwithstanding their common origin, and notwithstanding any relationship between claimants (a) and (b). This is a fragmenting conclusion, but consistent with the

109. William W. Park, *Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803, 831 (2002). Professor Park also notes that third-party beneficiaries have been recognized in the context of life insurance policies and forum selection clauses. *Id.* at n.64.

110. A Vienna Convention analysis of treaty language leads to the conclusion that individuals have direct rights under the treaty. Douglas, *supra* note 10, at 167–68.

approach that States A and B are effectively the injured parties.

If, however, an injury to claimant (a) is just that, and an injury arising out of the same events to claimant (b) is nothing more than that, then the question of duplication centers on the relationship between claimants (a) and (b). If they are related entities such as a parent corporation and its subsidiary, corporate law principles would govern whether these were duplicative claims, and the potential for coordinating these claims would be greater.[111]

In fact, investor-state treaties often have exceptionally broad standing provisions permitting foreign investors who "own or control, directly or indirectly," investments in a host state, to bring claims to protect those investments.[112] Thus, more than one investor could bring a claim on behalf of a single investment. Investors may also submit claims to protect their own independent interests.[113] This broad standard raises the possibility of multiple proceedings arising from the same set of facts; whether these proceedings are duplicative or fragmented depends on one's view of the status of the relevant parties.

The divergent approaches suggested above would also potentially change the position of individual claimants with respect to a state's withdrawal from a treaty, or a state's settlement of a dispute that effectively waived some of the protections of the treaty vis-à-vis certain claimants. One question involves the duration of the primary obligations that states undertake in the treaties, such as the obligations to afford national treatment and most-favored-nation treatment to foreign investors. Under a delegated espousal approach, a state's decision to withdraw those protections would end those protections with respect to the investor. Under a third-party beneficiary approach, however, the obligations could be viewed as persisting at least as to the investments made while the treaty was in effect.[114] A second question about treaty withdrawal concerns the duration of the secondary rights—the ability to submit claims of violations of those primary rights to arbitration. Under a

111. Some arbitral tribunals have recognized that groups of related companies may possess a "single economic reality" tying them together for certain purposes, such as the attribution of an agreement to arbitrate to all of the related companies, even when only one has actually signed the agreement. *See* Bernard Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts—Parties—Issues*, 18 J. INT'L ARB. 251, 282–83 (2001); *see also infra* notes 289–291 and accompanying text.

112. *See, e.g.*, NAFTA, *supra* note 35, art. 1116.

113. Most investment treaties permit minority shareholders to bring claims to protect their interests. *See generally* KINNEAR ET AL., *supra* note 13, at 1116-11 to -15.

114. Under domestic contract law, third-party beneficiaries' rights vest in the beneficiary and may not be changed or withdrawn without the party's consent. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 311 (1981). This determination raises the question of when those rights vest; they may do so when the beneficiary manifests assent to the benefit, when she sues on the right, or when she changes her position in justifiable reliance on it. *Id.* In addition, the promisor has a continuing duty of performance towards the original promisee, as well as to the beneficiary. *Id.* § 305(1).

delegated espousal approach, if a state revoked its delegation, the individual's ability to vindicate the rights hitherto available under the treaty could end as well. If, on the other hand, the individual were a third-party beneficiary, his vindication rights might persist.

Another area of interest is individual claimants' ability to waive potential investment treaty claims before any dispute begins, perhaps as part of the negotiating and signing of a specific concession contract with the host state. If they are merely delegated the espousal ability that in the final analysis belongs to the state, they could not waive their claims. If they are third-party beneficiaries, however, one might presume that they could waive claims under the treaties, but only to the extent the creators of the right—the state parties to the treaty—conferred on them that right. Investment treaties typically require host states to grant to foreign investors greater market access rights than they enjoy in the absence of those treaties, including the possibility of investor-state dispute settlement. It would be paradoxical for a host state to require that investors waive the dispute settlement protections of the very treaty that their home state negotiated for their protection. One could thus reasonably interpret investment treaties as limiting the investor's third-party beneficiary rights to exclude pre-investment or pre-dispute waivers of the right to claim investment treaty protection. This approach is consistent with the decisions taken by investment treaty tribunals to date in response to the arguments of states that forum selection clauses in state contracts do not preclude the arbitration of alleged investment treaty violations.[115]

These different approaches also affect the possibility of waiver after a dispute has arisen. Settlement of a case is effectively a waiver of rights. A third-party beneficiary would have the ability to settle his case, an outcome that comports with standard practice. A state could enter into a settlement agreement in a complex dispute that would affect the rights of the individual parties. If the individual claimants were merely delegated the ability to espouse the claim, the state could settle the claim on their behalf, assuming again that it could effectively revoke the delegation. If the individual claimants were third-party beneficiaries with vested rights, the state could not settle the case without their consent.

Recent developments with respect to the ICSID Convention will test these theories. Bolivia has withdrawn its consent to arbitrate disputes under the ICSID Convention, which it is entitled to do under Article 71.[116] Pursuant to the terms of the ICSIDConvention, the withdrawal will

115. See the discussion of treaty directives in part IV.A, *infra*, for a discussion of tribunal approaches to alleged pre-dispute waivers of investment treaty protection.

116. Press Release, ICSID, Bolivia Submits a Notice under Article 71 of the ICSID Convention, (May 16, 2007) (available at http://www.worldbank.org/icsid/highlights/05-16-07.htm).

be effective on November 3, 2007, six months from the date notice was given.[117] The ICSID Convention provides the framework under which an arbitration will take place, but requires that consent to arbitration be given separately. This is usually done through contractual agreements between foreign investors and states to refer disputes to arbitration or through adherence to BITs, in which the state parties to the treaty provide a standing offer to arbitrate disputes with investors from the other state. The drafters of the ICSID Convention anticipated the difficulty that might arise should a state withdraw from the Convention whilst having outstanding agreements to arbitrate under it. The ICSID Convention thus provides that denouncing the Convention

> shall not affect rights or obligations under this Convention of that state or of any of its constituent subdivisions or agencies or of any national of that state arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.[118]

The operative question thus becomes that of consent—when is consent given under the ICSID Convention? There are no publicly available data as to the number of contracts containing referrals to ICSID arbitration into which Bolivia or state entities have entered, but those arrangements should not be affected as consent to arbitration has already been given. Of more interest is the fact that Bolivia has twenty-four BITs in place that contain offers to arbitrate investment disputes. It is not clear what effect Bolivia's withdrawal from ICSID will have on investors who seek to arbitrate under the ICSID Convention disputes that arise under those treaties. The answer will likely depend first on the language of the treaty itself, which might clarify the state parties' view of the consent given under the treaty.[119] If consent was given at the time of ratification of the BIT, then Bolivia's denunciation of the ICSID Convention is presumably insufficient to deprive ICSID of jurisdiction over the dispute. If, however, consent is not given until the commencement of any dispute, then Bolivia's renunciation could be deemed effective even as to those outstanding offers to arbitrate; indeed, this is the interpretation Bolivia would likely prefer.[120] It is also supported by Professor Schreuer in his authoritative commentary on the ICSID Convention:

> [A] unilateral offer of consent by the host State through legislation or a treaty before a notice under Arts. 70 or 71 would not suffice. The effect of the continued validity of consent under Art. 72 would only arise if

117. ICSID Convention, *supra* note 43, at art. 71.

118. *Id.* at art. 72.

119. *See* Emmanuel Gaillard, *International Arbitration Law*, N.Y.L.J., June 26, 2007, at 8.

120. *See* Alejandro Escobar, *Bolivia Exposes 'Critical Date' Ambiguity*, 3 GLOBAL ARB. REV., July, 2007, at 17, 18.

> the offer was accepted in writing by the investor before the denunciation or exclusion.[121]

This interpretation is supported by the plain languge of the treaty, but it renders the six-month denunciation period moot; claimants have no notice that the State is withdrawing its accession to the Convention, and thus cannot rush to perfect their consent before the denunciation becomes effective.[122] In practice this issue is likely to be hotly contested, with claimants arguing that they need only consent to arbitration before the six-month notice period expires.

In many cases sorting out these questions will depend on sorting out the complexities of the interrelationship between the ICSID Convention and various investment treaties, a fact-specific exercise beyond the scope of this Article. As Professor Gaillard suggests, the language of the various treaties will be helpful in that regard, and in some cases will resolve all outstanding questions.[123] Practically speaking, many treaties will permit arbitration under other regimes, such as the United Nations Commission on International Trade Law (UNCITRAL) rules, such that an investor's ability to assert claims under the treaty will not be utterly forestalled. Yet this functional approach to investor rights should not obscure the important question of what obligations Bolivia owes to foreign investors under the Convention as well as under the BITs, and even what obligations Bolivia owes to its own investors. Most of the attention has been on the rights foreign investors have to assert arbitration against Bolivia, yet Bolivia's withdrawal from the ICSID Convention affects Bolivian investors who might want to assert claims against foreign states under the ICSID Convention, but who will no longer have standing to do so, unless consent under the Convention has already been given. Viewing Bolivian investors, and foreign investors in Bolivia, as third-party beneficiaries under the ICSID Convention, as well as under the BITs, is consistent with the language of the ICSID Convention, which discusses rights conferred on individuals, and notes that they cannot be abrogated by either the state that is the home of the investor or the state that is the host to the investment.

2. Applicable Law

Forum shopping is attractive to claimants in municipal courts because of the possibility that some tribunals will prove to be more favorable venues in which to try their claims than others. The attractiveness usually stems from advantages in substantive law, procedure, or both. Tribunals offering the potential to resolve

121. CHRISOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1286 (2001).

122. *Id.*

123. Gaillard, *supra* note 119. Some BITs have "survival clauses," which extend the protections under the treaty for fifteen to twenty years after the treaty is terminated.

international economic law claims display some of the same attributes, but with certain unusual features.

Many tribunals were formed by particular treaties to resolve disputes arising only under that treaty. To the extent that a dispute involves multiple treaty violations, a claimant may need to seek relief in multiple tribunals to vindicate different rights. While filing in multiple fora will require duplication of effort, it may not lead to duplicative relief given the different powers conferred on different tribunals.

Because individuals have little to no standing before many international tribunals, their options are to some degree limited. They may not bring a claim before the WTO unless their home state espouses their claim.[124] Moreover, the Dispute Settlement Body (DSB) decides only if a state measure is consistent with the WTO Agreements.[125] The DSB does not consider whether a state's behavior results in other violations of international or municipal law. The European Court of Justice will decide only if a member state's measure is consistent with its Community obligations.[126] A NAFTA Chapter 19 tribunal similarly has a different purview, as does a NAFTA Chapter 11 tribunal.[127] The differences in applicable law among these tribunals are relatively distinct. To the extent that tribunals compete with each other, the competition is inter-systemic.

Individuals have more rights before *ad-hoc* tribunals formed to decide cases brought under investment treaties. One reason investor-state dispute settlement has proven so attractive is that claimants need not persuade their home states to espouse their claims. The law applicable in an investor-state proceeding is usually the law of the treaty, plus customary international law norms, such as fair and equitable treatment and full protection and security, that are incorporated into the treaty by reference.[128] These obligations are often replicated in several treaties. In that light, one might query whether a single state measure in

124. General Agreement on Tarrifs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 1–2, Dec. 15, 1993, 33 I.L.M. 112 [hereinafter Dispute Settlement Understanding].

125. George A. Bermann et al., Cases and Materials on European Law 58–59 (2d ed. 2002); *see also* James E. Pfander, *Member State Liability and Constitutional Change in the United States and Europe*, 51 AM. J. COMP. L. 237, 264 (2003) (describing he evolution of European Court of Justice jurisprudence.

126. Dispute Settlement Understanding, *supra* note 124, at art. 3.

127. See Jon Johnson, *The Effect of the Softwood Lumber Agreement 2006 on the NAFTA Chapter Nineteen Binational Panel Process*, GOODMAN'S UPDATE, Nov. 24, 2006, 1, 3 *available at* http://www.goodmans.ca/index.cfm?fuseaction=PublicationDetail&primaryKey=684 (noting a distinction between WTO and NAFTA binational process and Canada's two-track strategy to gain relief).

128. *See generally* KINNEAR ET AL., *supra* note 13, 1105-6 to -15; U.N. CONFERENCE ON TRADE AND DEV., FAIR AND EQUITABLE TREATMENT, at 12, U.N. Doc. UNCTAD/ITE/IIT/11 (VOL. III), U.N. Sales No. E.99.II.D.15 (1999).

violation of those obligations results in a single breach of international law for which separate claims can be filed, or whether there are independent breaches of international law. To the extent that these tribunals compete with each other, the competition is inter-arbitral.[129]

If it is assumed that breaches of similar provisions in different treaties are distinct injuries, there could be duplicative claims for recovery, albeit under ostensibly separate causes of action. The inefficiency and potential unfairness of this result suggest that a different conception of the injuries involved would be desirable. Concluding that the obligations in question were owed to the investors under a third-party beneficiary theory, rather than solely to the home countries of the investors, would permit a more satisfactory analysis of the relationship between the investors and their investment. One could then analyze whether the investors were indeed alleging conceptually distinct injuries, or whether the injuries were the same and recompensable only once.

3. Relief Available

Claimants submit claims to dispute settlement to obtain relief. They may want vindication in the form of a declaratory judgment, injunctive relief to prevent further injury, or money damages. Tribunals differ significantly in the kinds of relief they can give, and sometimes their authority is extremely limited. This means that a claimant seeking redress for allegedly wrongful state measures may be forced to go to different tribunals in order to get comprehensive relief. An individual claimant may, however, be limited in his options because he will have standing before very few tribunals. A private claimant acting in concert with his home state will have the most options.

The WTO Dispute Settlement Body, for example, can order only prospective relief. It can determine that a member state has violated its WTO obligations and order that the state bring its practice into compliance, but it has no authority to order retroactive relief or the payment of money damages. A NAFTA Chapter 19 tribunal is also limited in authority.[130] It reviews decisions of the administrative authorities of the member states utilizing the standard of review that

129. Labeling this competition intra-systemic would nicely parallel the inter-systemic label. Yet caution is in order as it is far from clear that the network of over 2,400 investment treaties forms any kind of coherent system. *See* U.N. CONFERENCE ON TRADE AND DEV., BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING, at 141, U.N. Doc. UNCTAD/ITE/IIT/2006/5, U.N. Sales No. E.06.II.D.16 (2007) ("[T]he fact that most BITs address basically the same issues does not mean that they have the same underlying rationale, nor does it mean that all agreements provide the same degree of investment protection or have evolved homogeneously over the last decade. Rather, the enormous increase in BITs during the review period has resulted in a greater variety of approaches with regard to individual aspects of their content.").

130. Dispute Settlement Understanding, *supra* note 124, at art. 19.1.

would be employed by the domestic court.[131] Thus, a tribunal reviewing a decision of a U.S. administrative authority employs "*Chevron*" deference[132] to the agency's ruling. The tribunal can remand to the agency to revisit its methodology or to devise a new methodology, but it cannot "substitute its judgment for that of the agency." It also cannot order the payment of damages.[133]

An investor-state tribunal, including one formed under NAFTA, often has the authority only to order money damages.[134] Those money damages can be both retrospective and prospective. Investor-state tribunals have no authority to issue injunctive or declaratory relief. NAFTA Chapter 11 tribunal cannot order attachment of assets or enjoin the application of the measures alleged to be a breach of the treaty; their authority is limited to ordering interim measures of protection that will preserve evidence or guard the tribunal's jurisdiction.[135]

In many instances, claimants who pursue relief from multiple tribunals will not get duplicative recovery even if they succeed in more than one venue. In some cases, however, decisions based on different laws conflict, or will need to be reconciled. In rare cases, tribunals will order what appears to be duplicative relief. Whether it is actually a case of "double-dipping" depends on how you view the parties to the different disputes, or on whether the challenged laws should be viewed as causing separate injuries deserving of separate recompense.

III. FRAGMENTATION AND DUPLICATION REIFIED: THE *LUMBER & LAUDER* CASES

Lest it be imagined that cases of adjudicatory competition are theoretical only, let us consider some examples of the cross-jurisdictional nature of some recent cases. Two cases in particular offer dramatic examples of the fragmentation among tribunals in terms of applicable law and relief available and of duplicative proceedings resulting in

131. NAFTA, *supra* note 35, at art. 19.3 & Annex 1911.

132. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

133. A Chapter 19 tribunal also cannot order the disbursement and repayment of duties already collected, although, if the Commerce Department revokes an order pursuant to a panel remand, the same disbursement and payment proceedings that apply to domestic procedures should apply in the aftermath of a Chapter 19 tribunal decision. NAFTA, *supra* note 35, at art. 1904.15. The United States has argued that NAFTA panel decisions have prospective effect only, but has lost that argument at the Court of International Trade. Tembec Inc. v. United States, 461 F. Supp. 2d. 1355, 1360 (2006).

134. *See* CAMPBELL MCLACHLIN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPALS 341-43 (2007) (noting theoretical possibility of non-monetary relief but practical recourse of nearly all tribunals to ordering monetary payments).

135. NAFTA, *supra* note 35, at art. 1134. Should other provisional measures in aid of arbitration be necessary, claimants can seek them from a municipal court. *See* KINNEAR ET AL., *supra* note 13, at 1134-12 to -14; JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 610-25 (2003).

inconsistent decisions.[136]

A. THE *SOFTWOOD LUMBER* CASES

The *Softwood Lumber* cases between the United States and Canada are the quintessential example of fragmentation; they illustrate the allocation of authority among various tribunals and the resulting disaggregated nature of proceedings that all arose from fundamentally the same dispute. There is also limited duplication in the efforts of the tribunals seised with the lumber dispute and in the relief they could potentially award.

1. *History of the* Softwood Lumber *Disputes*

The United States and Canada have been disputing about softwood lumber exported from Canada to the United States for nearly 25 years.[137] There have been four trade cases, most of which involved multiple stages. The first two, *Lumber I* and *Lumber II*, predated NAFTA and its predecessor, the Canada—United States Free Trade Agreement.[138] *Lumber III*, a five-year saga that tested the newly minted binational panel process set out in Chapter 18 of the Canada—United States Free Trade Agreement, ultimately culminated in an agreement under which Canada imposed voluntary restraints on the exports of lumber to the United States.[139] The most recent iteration, *Lumber IV*, involved a constellation of disputes that were considered for more than five years by various national and international bodies before again ending in settlement.

The softwood lumber dispute revolves around differences in the ways in which Canadian and American harvesters acquire standing timber, or the right to cut down standing timber. In the United States, most timber is privately owned, while in Canada most is publicly owned. Canadian provincial governments are responsible for forest management, including harvesting. Stumpage programs are the means by

136. These are only two of many examples. For an excellent summary of significant parallel proceedings, see Yannaca-Small, *supra* note 97.

137. The start of the dispute is usually dated to the first countervailing duty case filed against Canada in 1982, *Lumber I*. The United States Coalition for Fair Lumber Imports filed a claim on October 7, 1982, but the case ended in 1983 when the Department of Commerce issued a final determination that Canada had not subsidized the softwood lumber industry. 48 Fed. Reg. 24159 (Dep't of Commerce May 5, 1983). *See generally* WILLIAM J. DAVEY, PINE & SWINE 172–79, 232–50 (1996).

138. *Lumber II* was terminated by a Memorandum of Understanding ("MOU") whereby Canada agreed to impose a tariff of 15% on all lumber exports to the United States. Agreement concerning trade in certain softwood lumber products, with memorandum of understanding, agreed minute, and related letters. Effected by exchange of notes at Washington, Dec. 30, 1986, 26 I.L.M. 875 (1987). The Canada-U.S. Free Trade Agreement was signed while the MOU was still in force, and included provisions recognizing and upholding the MOU. Canada-U.S. Free Trade Agreement, U.S.-Can., Jan. 2, 1988, 27 I.L.M. 281 (entered into force Jan. 1, 1989).

139. *See* Softwood Lumber Agreement, U.S.-Can., May 29, 1996, 35 I.L.M. 1195.

which the provinces administer their timberlands. In general, stumpage programs entail long-term tenure agreements by which a provincial government grants the right to harvest timber to a contracting company. Tenure holders must agree to assume certain obligations, such as road development, ecosystem management, and minimum cut requirements. When a tenure holder exercises its harvesting rights, it pays "stumpage fees" based on the volume of timber cut. Canada exports much of its lumber, primarily to the United States.

In the softwood lumber dispute, the primary claim of the U.S. petitioners is that stumpage programs constitute unfair subsidies. Canadian producers, the petitioners contend, pay far below fair market value for logs they acquire through stumpage systems, which gives their exports an unfair price advantage against domestic U.S. products.[140] The Canadian respondents deny that unfair subsidies exist. Their position is that stumpage programs do not include subsidies. Moreover, Canadian tenure holders incur a variety of costs, such as forest maintenance responsibilities, which are not reflected in the stumpage fees.

2. Lumber IV *(2001–2007)*

The Softwood Lumber Agreement that resolved *Lumber III* expired on March 31, 2001.[141] Two days later, the Coalition for Fair Lumber Imports filed new antidumping and countervailing duty petitions against Canadian lumber imports, thus commencing the complex set of disputes comprising *Lumber IV*.[142] Because *Lumber III* settled in 1996, *Lumber IV* was the first softwood lumber dispute to test the dispute settlement mechanisms of both the NAFTA and the WTO. The lumber dispute has always been hard fought, but this time Canada, Canadian lumber producers, and Canadian investors battled the United States on all available fronts.

The *Lumber IV* dispute is a classic case study of fragmentation in economic dispute resolution and the ensuing problems. Different

140. Because so much of the Canadian market consists of government sales of lumber, the Commerce Department has struggled to define and measure "true market value" in its determinations. In *Lumber I*, for example, it measured Canadian government costs against revenues it received from its stumpage sales, and found a fair market price wherever the revenues exceeded the costs. Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 24,159, 24,168 (May 31, 1983) (final negative countervailing duty determination). Later, Commerce created methodologies by which it tried to construct a theoretical fair market price in Canada and compare it to prices the producers in the U.S. paid for their domestic logs. Certain Softwood Lumber from Canada, 57 Fed. Reg. 22,570, 22,574 (May 28, 1992) (final affirmative determination). This was one of the issues before the binational panel in Lumber IV. *See infra* notes 161–164 and accompanying text.

141. Softwood Lumber Agreement, U.S.-Can., May 29, 1996, 35 I.L.M. 1195.

142. Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 21,332, 21,332 (Apr. 30, 2001) (notice of initiation of countervailing duty investigation); Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 21,328, at 21,328–29 (Apr. 30, 2001) (notice of initiation of antidumping duty investigation).

claimants sought different relief under different legal theories before different tribunals. The proceedings were inefficient, expensive, and ultimately dissatisfying for both the United States as a defendant and for Canada and Canadian claimants. On September 12, 2006, Canada and the United States entered into yet another agreement to settle their dispute.[143]

The United States follows a bifurcated procedure in trade cases. Initially the Department of Commerce determines whether a foreign government has provided countervailable subsidies to the industry manufacturing the goods under review, and, separately, whether goods are being sold at less than fair value ("dumped") in the U.S. market. The U.S. International Trade Commission (ITC) determines whether the domestic industry is injured by reason of the subject imports.[144] Each administrative agency must make an affirmative determination before the Commerce Department will issue a countervailing duty or antidumping order.[145]

a. WTO Proceedings

The Department of Commerce issued its preliminary determination that Canada had subsidized the export of softwood lumber and that critical circumstances warranted the imposition of retroactive duties. The Government of Canada then sought relief before a panel of the WTO's Dispute Settlement Body.[146] The WTO panel decided that the United

143. Softwood Lumber Agreement, U.S.-Can., Sept. 12, 2006, as amended Oct. 12, 2006 [hereinafter SLA 2006], *available at* http://www.dfait-maeci.gc.ca/trade/eicb/softwood/SLA-main-en.asp. Political settlement of the dispute seems to be the most satisfactory solution for both parties, as often neither prevails to the extent it wishes, or faces a reluctance to implement the decisions. *See* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 153–54 (3d ed. 2005) ("[T]he *Softwood Lumber* dispute has displayed the fragility of the Chapter 19 review process in cases where genuine normative conflict underlies the dispute and represents a legitimacy crisis for that process of considerable proportions; despite repeated rulings finding defects in the reasoning of the US Comerce Department and the ITC over a considerable number of years, FTA and NAFTA panels in this dispute have failed to produce a resolution of the dispute . . . .").

144. U.S. INT'L TRADE COMM'N, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK, I-9, I-12 to -13 (1998).

145. A provisional imposition of duty will be applied to all imports for which the Commerce Department and the International Trade Commission (ITC) have made preliminary affirmative determinations. *Id.* at II-13 to -14. It is the final determination that determines whether the order remains in place. *Id.*

146. Before *Lumber IV* commenced, Canada also sought declaratory relief from the WTO that the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("URAA"), and the Preamble to U.S. countervailing duty regulations directed the Commerce Department to treat log export restraints as countervailable subsidies in violation of the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The WTO panel found that log export restraints could not be treated as countervailable subsidies, but determined that neither the Statement of Administrative Action nor the Preamble was mandatory, so the Commerce Department had the discretion to implement the law in a manner consistent with the United States' WTO obligations. Panel Report, *United States—Measures Treating Export Restraints as Subsidies*, WT/DS194/R (June 29, 2001).

States had erred in its determination that the stumpage program provided a benefit to the recipients. That is, the Department of Commerce erred in measuring the amount charged by Canada for stumpage against prevailing market conditions in the United States, rather than against the prevailing market conditions in Canada, as required by the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[147] The panel rejected certain other conclusions of the Department with respect to the calculation of the benefit conferred, and also determined that the critical circumstances determination did not conform to the requirements in the SCM Agreement.[148] The panel recommended that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the SCM Agreement.

The Department of Commerce announced its final countervailing duty determination before the WTO panel had issued its decision with respect to the preliminary determination. The United States thus was not able to adjust its methodology in response to the WTO panel decision; the final decision also employed U.S. lumber prices as a benchmark.[149] Canada also challenged the Department of Commerce's final countervailing duty determination before the WTO.[150] Since the Department used the same methodology in its final determination as it had preliminarily, expectably the outcome was virtually the same. The second WTO panel, too, found that a plain language interpretation of the SCM Agreement precluded the Commerce Department from using the United States market as a benchmark for determining whether there was a benefit to the recipient.[151] Thus, although it acknowledged the possibility that Canada's stumpage program could constitute a countervailable subsidy, it determined that the Commerce Department's subsidy measurement was inconsistent with the SCM agreement.[152]

Before the WTO panel, Canada also challenged the Commerce

147. Panel Report, *United States—Preliminary Determinations with Respect to Certain Softwood Lumber Products from Canada*, para. 7.59, WT/DS236/R (Sept. 9, 2002).

148. *Id.* paras. 7.84, 7.115

149. Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,545, app. I § V(C) (Apr. 2, 2002) (final affirmative countervailing duty determination).

150. Panel Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R (Aug. 29, 2003).

151. *Id.* para. 7.64.

152. *Id.* para. 8.1. The United States and Canada each appealed portions of the panel's ruling. The appellate body upheld the panel's finding that stumpage programs could constitute a countervailable benefit, but reversed the panel's finding as to the appropriate benchmark to use when measuring the amount of a subsidy. It did not endorse the Commerce Department's approach, but determined that the investigating authority ought to have established that the private prices were distorted because of the government's role in the market before it could use another benchmark, and remanded on other issues as well. Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, para. 167, WT/DS257/AB/R (Jan. 19, 2004).

Department's separate determination that the Canadian industry was dumping softwood lumber in the U.S. market. Canada won on certain issues at the panel stage—in particular, the panel ruled that U.S. practice with respect to "zeroing"[153] violated the Antidumping Agreement.[154] An appellate body report upheld that determination but reversed other aspects of the panel's decision.[155]

On December 20, 2002, before the WTO, Canada challenged the ITC's determination that the U.S. lumber industry was threatened with material injury by reason of imports of softwood lumber from Canada. The WTO panel found that the United States had failed to comply with the requirements in both the Antidumping Agreement and the SCM Agreement for finding a threat of material injury because the ITC's conclusion that there was a likelihood of substantially increased imports was not consistent with the requirements of those Agreements.[156] Because the ITC's conclusion as to injury "by reason of" the subject imports rested on that inconsistent finding, the conclusion could not stand.[157] The panel directed the United States to bring its measures into conformity with the United States' international obligations.

The United States did not challenge the WTO decision with respect to the ITC's conclusion. Instead, pursuant to section 129 of the Uruguay Round Agreements Act ("URAA"), governing the implementation of adverse WTO panel decisions, the ITC issued a new affirmative threat determination on November 24, 2004 that it said was consistent with the

153. In determining whether or not there has been dumping, Commerce determines the weighted average export price in comparison to the weighted average normal value. Commerce aggregates the different values determined for different product types to compute the overall margin of dumping. Zeroing is the process whereby Commerce attributed a value of zero to those instances in which the weighted average export price was greater than the weighted average normal value, rather than attributing the full price charged to the goods in question. Product types priced above the approximate average normal value did not therefore offsent those priced below and the overall effect of any dumping was magnified. *See* Panel Report, *United States—Final Dumping Determination with Respect to Certain Softwood Lumber from Canada*, paras. 7.185–7.186, WT/DS264/R (Apr. 13, 2004).

154. Panel Report, *United States—Final Dumping Determination with Respect to Certain Softwood Lumber from Canada*, para. 8.1, WT/DS264/R (Apr. 13, 2004).

155. Appellate Body Report, *United States—Final Dumping Determination with Respect to Certain Softwood Lumber from Canada*, para. 181, WT/DS264/AB/R (Aug. 11, 2004). There were also further proceedings under Articles 21.3(c) and 21.5 of the DSU. Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/13 (Dec. 13, 2004); Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW (Apr. 3, 2006); Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW (Aug. 15, 2006).

156. Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R (Mar. 22, 2004). Canada subsequently challenged the implementation of recommendation of the Dispute Settlement Body under Article 21.5 of the Dispute Settlement Understanding.

157. *Id.* paras. 2.5, 8.2.

WTO decision.[158] Canada challenged the United States' actions before the WTO on the grounds that issuance of a new determination did not constitute compliance with the panel decision. While a panel agreed with the United States, the appellate body reversed the panel finding as to compliance.[159]

b. NAFTA Chapter 19

After the Commerce Department issued its final countervailing duty determination, Canada, the governments of several Canadian provinces, and a number of Canadian lumber producers' associations challenged the determination before a NAFTA Chapter 19 panel.[160] The claimants challenged the Commerce Department's determination on the ground that it departed from the URAA, the U.S. legislation implementing the WTO Agreements. The NAFTA Chapter 19 panel affirmed many of the Commerce Department's determinations, but remanded to Commerce on the question of the benefit conferred by Canada and the adequacy of the remuneration Canada received for providing stumpage to Canadian lumber producers.[161] Commerce had based its adequacy determination on U.S. market prices for lumber, and had determined that Canadian stumpage rates conferred a benefit on Canadian producers because the rates were lower than U.S. market rates.[162] The NAFTA panel determined that using cross-border benchmarks was inconsistent with both Commerce's regulations and prior Commerce department

158. Softwood Lumber from Canada, U.S. ITC Pub. No. 3740, Inv. Nos. 701-TA-414, 701-TA-928, Section 129 Determination (Nov. 24, 2004). Canada had previously challenged section 129(c)(1) of the URAA as violative of the United States's WTO obligations, but did not prevail on that argument. Panel Report, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, paras. 6.126, 6.129, WT/DS221/R (July 15, 2002). The panel found that a member's obligation under the Dispute Settlement Understanding extended only to providing prospective relief. *Id.* Thus, the fact that section 129(c)(1) did not require the United States to refund previously collected duties was not contrary to the United States' WTO obligations.

159. Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW (Apr. 13, 2006).

160. Certain Softwood Lumber Products from Canada, USA-CDA-2002-1904-03, Review of DOC Final Affirmative CVD Determination (Aug. 13, 2003) [hereinafter First NAFTA Chapter 19 CVD Decision], *available at* http://www.worldtradelaw.net/nafta19/lumber-cvd-nafta19.pdf. The provincial government claimants were Alberta, British Columbia, Manitoba, the Northwest Territories, Ontario, Quebec, Saskatchewan, and the Yukon Territory. The private associations were the British Columbia Lumber Trade Council, the Ontario Forest Industries' Association, the Ontario Lumber Manufacturers' Association, and the Quebec Lumber Manufacturers' Association.

161. The NAFTA panel also remanded on excluding certain products from the class or kind of product under review. *Id.* at 91.

162. *Id.* at 10. Although the panel affirmed the Department of Commerce's other determinations, it made clear it was doing so because of the deferential standard of review, rather than because the panel agreed with the Department's determinations. *Id.* The panel recognized that the limited scope of judicial review of expert agency decisions prevented the panel from second-guessing the Department's expert judgment in such matters of degree, and therefore it had to affirm the Department's determinations. *Id.* at 47.

practice.[163] Fresh appeals to Chapter 19 panels and further remands followed with respect to the Commerce Department's determination.[164]

Canadian claimants also challenged the ITC's threat of material injury determination before a NAFTA Chapter 19 panel.[165] The NAFTA Chapter 19 panel found that the evidence did not support the ITC's determination that unused production capacity would lead to an increase in the volume of subject imports; evidence did not show that price trends demonstrated the likelihood of lower prices or that increased volume of imports would outstrip increasing demand.[166] Thus, the ITC had failed to support its conclusion that there was a likelihood of a threat of material injury.

After two remands, the Chapter 19 panel again reviewed the ITC's decision. The panel found that the ITC had again based its affirmative threat finding on an administrative record that the panel had twice before held to be insufficient as a matter of law. The panel thus precluded the ITC from again considering the matter, but directed the ITC to issue within ten days a determination that there was no threat of material injury.[167] Despite this order, the ITC issued another affirmative determination. Finally, after another NAFTA panel decision following the third remand, the ITC issued a negative threat of material injury determination.[168] The United States requested the formation of an

163. The regulation in question was 19 C.F.R. Part 351.511(a)(2)(ii).

164. Ultimately there were six Chapter 19 Panel decisions on the Commerce Department's findings. Certain Softwood Lumber Products from Canada, NAFTA Chapter 19, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03, Decision of the Panel (Aug. 13, 2003), *available at* http://www.worldtradelaw.net/nafta19/lumber-cvd-nafta19.pdf; Certain Softwood Lumber Products from Canada, NAFTA Chapter 19, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03, Decision of the Panel on First Remand (June 7, 2004), *available at* http://www.worldtradelaw.net/nafta19/lumber-cvd-remand-nafta19.pdf; Certain Softwood Lumber Products from Canada, NAFTA Chapter 19, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03, Decision of the Panel on Second Remand (Dec. 1, 2004), *available at* http://www.worldtradelaw.net/nafta19/lumber-cvd-remandII-nafta19.pdf; Certain Softwood Lumber Products from Canada, NAFTA Chapter 19, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03, Decision of the Panel on Third Remand (May 23, 2005), *available at* http://www.worldtradelaw.net/nafta19/lumber-cvd-remandIII-nafta19.pdf; Certain Softwood Lumber Products from Canada, NAFTA Chapter 19, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03, Decision of the Panel on Fourth Remand (Oct. 5, 2005), *available at* http://www.worldtradelaw.net/nafta19/lumber-cvd-remandIV-nafta19.pdf; Certain Softwood Lumber Products from Canada, NAFTA Chapter 19, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03, Decision of the Panel on Fifth Remand (Mar. 17, 2006), *available at* http://www.worldtradelaw.net/nafta19/lumber-cvd-remandV-nafta19.pdf.

165. NAFTA Chapter 19 ITC Determination, USA-CDA-2002-1904-07 (Dec. 14, 2003), *available at* http://canada.usembassy.gov/content/can_usa/trade_softwoodlumber_report121603.pdf.

166. *Id.* at 66.

167. NAFTA Chapter 19 ITC Determination After Second Remand, USA-CDA-2002-1904-07 (June 10, 2004), *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3715.pdf.

168. Softwood Lumber from Canada, USITC Pub. 3815, Inv. Nos. 701-TA-414, 731-TA-928, Views on Remand (Sept. 10, 2004), *available at* http://hotdocs.usitc.gov/docs/pubs/

Extraordinary Challenge Committee to review the Chapter 19 Panel's third remand determination, but the panel was never constituted.

c. NAFTA Chapter 11

Three Canadian lumber producers who had investments in the United States invoked the protections of Chapter 11 of the NAFTA to challenge the Department of Commerce's countervailing duty and antidumping duty determinations, as well as the U.S. ITC's determination that the U.S. lumber industry was threatened with material injury by reason of imports of softwood lumber from Canada. The first producer to file, in 2002, was the Canfor Corporation.[169] Two other companies followed in 2004: Terminal Forest Products[170] and Tembec.[171] The claims varied slightly in the details. However, all producers claimed that the determinations of the Commerce Department and the ITC violated the United States' NAFTA obligations to afford national treatment (non discrimination) to Canadian investors and investments, and to accord the minimum standard of treatment to investments owned by Canadian investors.[172] They also claimed that the United States had expropriated their property without payment of compensation, in violation of Article 1110 of NAFTA.[173] Each lumber producer attacked the "Byrd" Amendment as a violation of the national treatment, most-favored-nation treatment, and minimum standard of treatment provisions of NAFTA. The Byrd Amendment, included in the Agricultural Appropriations Act of 2001, provides that any countervailing or antidumping duties collected by the United States be paid to the domestic producers who petitioned the U.S. administrative agencies for relief.[174] The Byrd Amendment gives domestic producers double incentive to petition U.S. administrative agencies to commence antidumping or countervailing duty investigations; successful petitions result not only in the imposition of duties against importers but also in

701_731/pub3815.pdf.

169. Canfor Corp. v. United States, UNCITRAL, Notice of Arbitration and Statement of Claim (May 23, 2002) [hereinafter *Canfor* Notice of Arbitration], *available at* http://www.state.gov/documents/organization/13203.pdf.

170. Terminal Forest Prods. Inc. v. United States, UNCITRAL, Notice of Arbitration (Mar. 30, 2004) [hereinafter *Terminal* Notice of Arbitration], *available at* http://www.state.gov/documents/organization/31360.pdf.

171. Tembec Inc. v. United States, UNCITRAL, Notice of Arbitration and Statement of Claim (Dec. 3, 2004) [hereinafter *Tembec* Notice of Arbitration], *available at* http://www.state.gov/documents/organization/27805.pdf.

172. *Canfor* Notice of Arbitration, *supra* note 169, para. 19; *Terminal* Notice of Arbitration, *supra* note 170, paras. 21–23; *Tembec* Notice of Arbitration, *supra* note 171, paras. 100–08.

173. *Canfor* Notice of Arbitration, *supra* note 169, para. 109; *Terminal* Notice of Arbitration, *supra* note 170, para. 39; *Tembec* Notice of Arbitration, *supra* note 171, paras. 109–10.

174. U.S. Int'l Trade Comm'n, Trade Remedy Investigations, "Byrd Amendment," http://www.usitc.gov/trade-remedy/731_ad_701_cvd/byrd.htm (last visited Nov. 22, 2007).

the payment of those duties directly to the domestic industry.[175]

Canfor Corporation claimed damages of not less than $250 million;[176] Terminal Forest Products damages of not less than $90 million;[177] and Tembec damages of at least $200 million.[178]

These cases were consolidated pursuant to NAFTA Article 1126, allowing the consolidation of cases with common questions of law or fact. The consolidation tribunal dismissed the portions of the case challenging the acts of the administrative authorities on the ground that Chapter 19 was the only NAFTA venue for such challenges.[179] The consolidation tribunal retained jurisdiction over the allegations that the Byrd Amendment violated the United States' international law obligations.[180]

d. U.S. Court of International Trade (CIT)

International tribunals were not the only venues hosting the Softwood Lumber Dispute. The CIT entertained several disputes, three of which are detailed here. The first dispute involved a challenge to the Byrd Amendment.[181] That case was brought by the Canadian Government and the Canadian Lumber Trade Alliance on behalf of Canadian lumber exporters. The CIT first determined that Canada lacked standing to pursue its claims about the Byrd amendment because it had already elected a remedy for that breach by pursuing and winning that claim before the WTO; Canada was not entitled to multiple remedies for the same breach.[182] The Canadian exporters, on the other hand, did have standing, and prevailed in their argument that section 408

175. A group of countries, including Canada, challenged the Byrd Amendment before the WTO and prevailed in their argument that the Byrd Amendment violated U.S. WTO obligations. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 318, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003). For several years the United States declined to implement the WTO decision, but Congress voted to repeal the legislation in early 2006, with the repeal to be effective October 1, 2007. Deficit Reduction Act, S. 1932, 109th Cong. § 7601 (2006).

176. *Canfor* Notice of Arbitration, *supra* note 169, at 50.

177. *Terminal* Notice of Arbitration, *supra* note 170, at 17.

178. *Tembec* Notice of Arbitration, *supra* note 171, at 45.

179. Canfor Corp. & Terminal Forest Prods. v. United States, UNCITRAL, Decision on Preliminary Question, paras. 347–49 (June 6, 2006), *available at* http://ita.law.uvic.ca/documents/CanforTerminalDecision6June2006.pdf.

180. *Id.* para. 349.

181. Canadian Lumber Trade Alliance v. United States, 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006).

182. *Id.* at 1350–51. This was an interesting holding given that the basis for the CIT claim was specific language in NAFTA relating to the implementation of trade measures in the three state parties to that agreement, while Canada's claim before the WTO hinged on the proper interpretation of the WTO Agreements. In that respect the claim arose from a different cause of action. The recovery sought in each tribunal was slightly different as well, though with respect to Canada it was arguably the same. Whereas the WTO tribunal ordered prospective relief only, the CIT ordered the repayment of duties assessed on the merchandise. Canada had not paid any duties, however, so its injury was arguably redressed by the WTO order to remove the offending provision, regardless of the legal basis for so doing.

of the NAFTA Implementation act prevented the Byrd Amendment from applying to Canada or Mexico.[183]

The second CIT dispute involved the ITC and the final threat of material injury decision it issued pursuant to section 129 of the URAA, which governs agency orders issued after a negative WTO determination.[184] The ITC had concluded that revising its decision consistent with the WTO order would still result in an affirmative determination.[185] The ITC issued this affirmative determination after it had issued a negative determination as ordered by the NAFTA Chapter 19 panel.[186] The Office of the United States Trade Representative (USTR) interpreted the URAA as permitting the issuance of such an affirmative determination and concluded that it took precedence over the NAFTA.[187] The Canadian government, certain provincial governments, and members of the Canadian lumber industry challenged the USTR's interpretation.[188] The CIT found that it had jurisdiction to hear the case, and determined that USTR had incorrectly interpreted and applied section 129 and that USTR's order was therefore *ultra vires* and void.[189] In a further proceeding, the CIT ordered the refund of duties paid by Canadian producers while the disputes were pending.[190]

The third CIT dispute involved a request by Canadian producers of softwood lumber that it issue a writ of *mandamus* compelling the United States to appoint a member to an Extraordinary Challenge Committee convened under NAFTA Chapter 19 to review one of the NAFTA panel's decisions.[191] The CIT refused to issue the writ, stating that it was abstaining from proceeding because to proceed would unduly interfere with NAFTA proceedings.[192] The CIT held that while it had statutory jurisdiction over this case under 28 U.S.C. § 1581(i)(4), principles of comity favored abstention. First, the CIT determined that binational review panels constituted "foreign courts" for the purposes of comity.[193] The court said that binational panel review systems created a parallel procedure for the adjudication of trade disputes that was adequate and complete.[194] Furthermore, the NAFTA Implementation Act required

183. *Id.* at 1373.

184. *See* Tembec, Inc. v. United States, 441 F. Supp. 2d 1302, 1307 (Ct. Int'l Trade 2006).

185. *Id.*at 1308.

186. *Id.* at 1309.

187. *See id.* at 1310.

188. *Id.* at 1311.

189. *Id.* at 1343.

190. Tembec, Inc. v. United States, 461 F. Supp. 2d 1355, 1367 (Ct. Int'l Trade 2006).

191. Ontario Forest Indus. Assoc. v. United States, 444 F. Supp. 2d 1309, 1317 (2006).

192. *Id.* at 1322, 1328–29. At the time of the decision, proceedings regarding the case before an Extraordinary Challenge Committee were suspended because Canada and the United States had entered into settlement negotiations and had reached a tentative settlement agreement.

193. *Id.* at 1327.

194. *Id.*

U.S. courts to assist binational panels at the request of the panel, rather than at the request of the parties. That language suggested that Congress intended to leave the binational panel system free from judicial interference.[195]

e. The Softwood Lumber Agreement 2006

Canada and the United States had entered into negotiations to settle the case as early as April 2006.[196] The Softwood Lumber Agreement they eventually signed on September 12, 2006, established a managed trade regime based on export quotas and export taxes. The Softwood Lumber Agreement ended the trade cases before the ITC and the Department of Commerce.[197] It also provided that the NAFTA Chapter 19 case still pending against the Department of Commerce would be dismissed, as would the CIT Cases.[198] Canfor and Tembec agreed to dismiss their NAFTA Chapter 11 cases, although Terminal Forest Products refused to compromise its Chapter 11 claim.[199] It is reported that Terminal Forest Products has now requested that the case be dismissed.

B. THE *LUMBER* CASES ANALYZED

The *Lumber* cases demonstrate a fragmented dispute settlement structure, particularly with respect to the applicable law and the nature of the relief requested. First, the existence of separate tracks reviewing the Commerce Department's orders and the ITC's orders is striking. This dispersal has as much to do with U.S. law as it does with WTO and Chapter 19 procedures. Given the distinct roles played by the two U.S. administrative agencies, it is not clear that the substantive reviews are in any way duplicative. Since the two agencies need to work together, however, it is undesirable to have each challenge hewing to a different schedule.

Second, the Government of Canada clearly sought relief under two regimes—the WTO and NAFTA Chapter 19. This is particularly highlighted with respect to the ITC determination. The WTO tribunal was empowered to grant prospective relief only, and it did so—it ordered that the ITC bring its decision into compliance with the United States' WTO obligations. The NAFTA Chapter 19 tribunal, on the other hand, applied U.S. law. The relief it could order was limited to remanding the cases to the respective agencies. These remands could, however, lead to monetary relief in the form of duty refund orders, although the tribunal

195. *Id.* at 1328.

196. Sandra Cordon, *Rushed Softwood Deal Will Hurt Trade: Industry*, THE GLOBE AND MAIL, May 30, 2006, at B20 (discussing pact reached on April 27 to end the softwood lumber trade war).

197. SLA 2006, *supra* note 143.

198. *Id.* at Annex 2A, at 45–47. It also provided for dismissal of the pending challenge to the constitutionality of the Chapter 19 binational panel process.

199. *Id.* at Annex 2A, at 45–46.

could not order consequential damages. As interpreted by the United States executive branch the two tribunals' directives were incompatible: the WTO order permitted the unfair trade duties to remain in place, albeit only after the ITC had offered a different rationale for its determination, while the NAFTA binational panel demanded that they be removed. This incompatibility demonstrates that even fragmented proceedings may require some coordination.

Third, the private parties involved—mostly Canadian lumber exporters—also sought relief in different tribunals. They were coordinate parties in the Chapter 19 cases, and were autonomous claimants in the NAFTA Chapter 11 proceedings and the CIT proceedings. The CIT and the Chapter 19 proceedings addressed different issues. The case before the NAFTA Chapter 11 tribunal, however, addressed issues similar to those before the other tribunals, albeit as violations of the international legal obligations found in NAFTA Chapter 11. Damages from the Chapter 11 tribunal would be payable directly to the investors, and could include consequential damages in addition to compensatory relief.

Fourth, the NAFTA Chapter 11 proceedings demonstrate two anti-fragmentation techniques. First, the decision to consolidate the proceedings eliminated inefficiencies in hearing the same challenges to the identical government measure in parallel fora. This is precisely the purpose for which NAFTA Article 1126 was designed. Second, by declining to exercise jurisdiction over the claimants' challenges to the acts of the administrative authority on the grounds that NAFTA Chapter 19 provided the exclusive mechanism, the Chapter 11 tribunal eliminated the possibility of duplicative relief, primarily on the grounds that concurrent or parallel proceedings were to be avoided.[200] Although the tribunal recognized that the legal theories under which relief was sought differed in the different venues, the tribunal reasoned the claims were parallel because they were based largely on the same facts.[201]

Fifth, the terms of the settlement agreement affecting individual investors are instructive. Canada and the United States implicitly followed a third-party beneficiary approach: two of the private claimants, Tembec and Canfor, were party to the agreement and agreed to withdraw their cases. The third, Terminal Forest Products, continued, at least for a time, to press its claims. This difference in treatment suggests that Canada did not consider it could require Terminal Forest Products to withdraw the Chapter 11 case.

200. Canfor Corp. & Terminal Forest Prods. v. United States, UNCITRAL, Decision on Preliminary Question, para. 242 (June 6, 2006), *available at* http://www.state.gov/documents/organization/67753.pdf.

201. *Id.* para. 246.

C. THE *LAUDER* CASES

The *Lumber* cases primarily demonstrate fragmentation. The *Lauder* cases offer an example of a duplication trifecta—the perception of unfairness, potential duplicate relief, and inconsistent decisions. A series of cases in various fora arose from a dispute centered around an investment in a Czech television station called TV Nova by an American investor, Ronald Lauder, via his Dutch investment company. The litigation involved three sets of events occurring in 1992, in 1996, and in 1999.

In 1992, a Czech media enterprise ("CET 21"), run by a citizen of what was then Czechoslovakia, Dr. Vladimir Železný, applied to the Czech Council for Radio and Television Broadcasts ("Czech Media Council") for a television broadcasting license to establish a television station.[202] The application was supported by the Central European Development Corporation ("CEDC"), a German company controlled by a U.S. citizen, Ronald S. Lauder.[203] To satisfy Czech restrictions on foreign ownership of broadcast licenses, the non-assignable license was granted to CET 21.[204] CET 21 and two other companies, including CEDC, then formed a third corporation, CNTS, to run TV Nova. CET 21's contribution of capital to CNTS was to be the broadcast license itself, while the other two entities contributed monetary capital.[205] The Council endorsed this so-called "split structure."[206] In August 1994, a Dutch company, CME Media Enterprise B.V., acquired CEDC's shares in CNTS. CME Media Enterprise was also ultimately controlled by Mr. Lauder. Eventually CME Media Enterprise owned 99% of CNTS through a wholly-owned Czech subsidiary.[207]

In 1996, the Czech Media Council reversed its position on the split structure, and pressured CNTS to give up its exclusive right to use the license.[208] As a result, the agreement between CET 21 and CNTS was amended in several respects, including changing the description of CET 21's investment in CNTS from "the use of the License" to "the use of the know-how of the License."[209] The amendments diminished CNTS's

202. Czech Republic v. CME Czech Republic B.V., 42 I.L.M. 919, 920–21 (Svea Ct. App. 2003) (Swed.).

203. *Id.*

204. *Id.* at 921.

205. *Id.*

206. *Id.* For a detailed explanation of these arrangements, see CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award, paras. 75–102 (Sept. 13, 2001) [hereinafter CME Partial Award], *available at* http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf.

207. Czech Republic v. CME Czech Republic B.V., 42 I.L.M. 919, 921 (Svea Ct. App. 2003) (Swed.).

208. *Id.*

209. *Id.*

position vis-à-vis CET 21, the nominal licensee.[210] By this time, TV Nova was the Czech Republic's most successful private television station.[211]

The relationship between CME, which owned nearly all of CNTS, and Dr. Železný, who controlled CET 21, deteriorated after the 1996 events.[212] Dr. Železný claimed more of TV Nova's revenues.[213] In March 1999, the Czech Media Council, apparently at the behest of Dr. Železný, wrote a letter suggesting again that the ownership structure of CNTS violated Czech law and that CET 21 was entitled to all advertising revenues from TV Nova.[214] After Dr. Železný took other steps to alter the exclusive relationship that previously existed between CET 21 and CNTS, CME Media Enterprise removed Dr. Železný from his position as general director of CNTS. Dr. Železný then caused CET 21 to end its ties to CNTS, and began broadcasting TV Nova through different companies.[215]

The convoluted corporate ownership structure gave rise to a number of claims by CNTS and its related ventures against several defendants, including the Czech Republic. The foreign investors, Ronald Lauder and the Dutch Company CME Media Enterprise, each filed separate investment treaty claims, while the Czech companies sought relief in international commercial arbitration and local courts.

1. Investor-State Arbitration Under the US-Czech Republic BIT

Mr. Lauder filed his case under the U.S.-Czech Republic BIT in August, 1999; the parties designated London as the place of arbitration.[216] Mr. Lauder alleged a violation of the following treaty provisions with respect to his investment: the obligation to provide fair and equitable treatment; the obligation to provide full protection and security; the obligation to treat investments in conformity with the minimum standard of treatment of international law; the obligation not to impair investments by arbitrary or discriminatory measures; and the obligation not to expropriate property.[217] The U.S.-Czech Republic BIT permits an investor to bring a challenge based only on violations of treaty provisions and certain customary international law standards; it does not allow an investor to bring a challenge based directly on violations of Czech law (except insofar as those violations also constitute a breach of

210. *Id.*; *see also* CME Partial Award, *supra* note 206, paras. 107–18 (containing a more detailed description of the negotiations in 1996).

211. CME Partial Award, *supra* note 206, para. 104.

212. *See id.* at paras. 122–29.

213. *Id.*

214. *Id.* para. 129.

215. *See id.* paras. 119–36 (describing Dr. Železný's actions regarding CET 21 and CNTS).

216. Ronald S. Lauder v. Czech Republic, UNCITRAL, Award, paras. 11, 14 (Sept. 3, 2001), *available at* http://ita.law.uvic.ca/documents/LauderAward.pdf.

217. *Id.* para. 42.

international law). The *Lauder* tribunal found that the 1992 acts requiring the formation of a third company to avoid the holding of a broadcast license by a non-Czech entity violated the investment treaty because it was arbitrary and discriminatory treatment, but that no damages were caused by it.[218] The tribunal concluded that the 1996 and 1999 events had not violated international law and thus no damages were due Mr. Lauder.[219]

2. *Investor-State Arbitration Under the Netherlands-Czech Republic BIT*

The *CME* case was initiated under the BIT between the Netherlands and the Czech Republic on February 22, 2000, with Stockholm as the place of arbitration.[220] CME alleged that the three sets of events violated several provisions of the treaty. In particular, CME claimed that: its investment, CNTS, was unlawfully expropriated in violation of Article 5; the Czech Republic had failed to accord CNTS "fair and equitable" treatment under Article 3(1); the Czech Republic had failed to accord it nondiscriminatory treatment under Article 3(1); the Czech Republic had failed to accord to CNTS full protection and security under Article 3(2); and the Czech Republic had not accorded CNTS the minimum standards required under international law, as required by Article 3(5) of the BIT.[221]

The *CME* tribunal determined that the 1992 events had not resulted in a violation of the applicable treaty, but that the 1996 and 1999 events had.[222] The tribunal issued a final award placing damages at $270 million.[223] The Czech Republic asked the Svea Court of Appeal in Stockholm, the place of arbitration, to invalidate or set aside the award. The court refused, upholding the award in all respects.[224]

3. *Proceedings Between the Two Czech Companies*

In proceedings in municipal court in the Czech Republic, CNTS tried to recoup its investment by suing CET 21 for having terminated the

218. *Id.* paras. 230–32, 235.

219. *Id.* para. 235.

220. CME Partial Award, *supra* note 206, paras. 2–3, 33.

221. *Id.* paras. 149–62.

222. *Id.* paras. 586–614, 624. One of the arbitrators, criticizing the reasoning processes of the two arbitrators in the majority and complaining of their treatment of him during the deliberations, dissented from that decision. CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Dissenting Opinion of the Arbitrator JUDr Jaroslav Hándl against the Partial Arbitration Award (Sept. 22, 2001), *available at* http://ita.law.uvic.ca/documents/CME-2001Dissent.pdf. He subsequently resigned, and was replaced by Professor Ian Brownlie. CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award, para. 34 (Mar. 14, 2003) [hereinafter CME Final Award] *available at* http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf.

223. CME Final Award, *supra* note 222, § IX, para. 1.

224. Czech Republic v. CME Czech Republic B.V., 42 I.L.M. 919, 920 (Svea Ct. App. 2003) (Swed.).

license-use agreement without cause. The Supreme Court of the Czech Republic held on November 14, 2000, that the termination had been wrongful, and remanded the case to the City Court of Prague.[225] In summer 2003, CNTS (and CME) also initiated arbitration in Vienna against CET 21 with respect to lost profits of $275 million resulting from the alleged improper termination of the license; had the case been successful, CME claims it would have returned $205 million to the Czech Republic.[226] The case has now settled.[227]

4. Arbitration Between Dr. Železný and CME

CME initiated arbitration under the International Chamber of Commerce (ICC) Arbitration in Amsterdam against Dr. Železný.[228] The basis for CME's claim was a clause in a "Share Purchase Agreement" through which it had increased its shares in CNTS by purchasing Dr. Železný's interests in the company. CME was to make a series of payments to Dr. Železný from 1997 through 2000. The Share Purchase Agreement contained Dr. Železný's covenant not to compete and also his undertaking not to solicit or entice away any employee of CME or CNTS. Both restrictions were to last until the final payment was to be made, in February 2000. CME alleged that Dr. Železný had violated those agreements. Though the ICC tribunal did not find for CME in all respects, it did find that Dr. Železný had violated parts of the Share Purchase Agreement and ordered him to restore to CME $23,350,000, plus applicable interest.[229]

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225. *Czech TV License Dispute Produces 2 Awards with Opposite Findings*, MEALEY'S INT'L ARB. REP., at 2 (2001).

226. *PPF's Purchase of CNTS Likely to End CME vs. Nova Dispute*, CZECH NEWS AGENCY (Prague), Oct. 8, 2003 (on file with the Hastings Law Journal). CET 21 representatives claimed the Vienna arbitration was brought in an attempt to influence the Czech Court decision. *See CET 21's Arbitrator in Dispute with CME is Martin Hunter*, CZECH NEWS AGENCY (Prague), Sept. 7, 2003 (on file with the Hastings Law Journal).

227. A change in ownership resulted in the settlement of the remaining disputes. *PPF Controls 66 Percent of Private TV Nova, SMEJC Has the Rest*, CZECH NEWS AGENCY (Prague), Dec. 19, 2003 (on file with the Hastings Law Journal).

228. CME Media Enterprises B.V. v. Vladimir Železný, International Court of Commerce Case No. 10435/AER/ACS, Final Award (Feb. 9, 2001) [hereinafter CME ICC Award]. The facts in the following paragraph are taken from the CME ICC Award.

229. *Id.* at 76, para. 1. CME ran into difficulties when it attempted to enforce the award in the United States. CME applied to a federal district court in New York in an attempt to attach Dr. Železný's account at Citibank in New York, and also sought an order for discovery to locate other assets in the jurisdiction. However, Dr. Železný's account contained only $69.65 (which amount was reduced to $0.05 when Citibank deducted certain fees). With respect to the discovery issue, the court determined that Dr. Železný's nearly empty bank account did not establish minimum contacts constitutionally necessary for the court to exercise personal jurisdiction. CME Media Enterprises v. Zelezny, 2001 WL 1035138, at *3–4 (S.D.N.Y. 2001). However, it appears that Dr. Železný paid the award after the Amsterdam District Court denied Dr. Železný's request to set it aside. Thomas Wälde, *Introductory Note to Svea Court of Appeals: Czech Republic v. CME Czech Republic B.V.*, 42 I.L.M. 915, 917 (2003).

D. THE *LAUDER* CASES ANALYZED

The *Lauder* cases more evidently demonstrate duplication than fragmentation, although there are elements of each presented by the myriad disputes at issue. Much ink has been lavished on the discrepancy in outcomes between the *CME* and *Lauder* decisions, their effect on the legitimacy of investment treaty arbitration, and the possibility that those tribunals could have given duplicative relief.[230] Less attention has been given to the fragmentation aspects of the cases.

Both the *CME* tribunal and the Svea Court of Appeal considered the arguments that the *Lauder* decision, which preceded the CME tribunal's decision, should have been treated as *res judicata* by the subsequent tribunal. Both rejected the argument on traditional international law grounds. The CME tribunal decided that *res judicata* did not apply because: (1) the parties were different; (2) the treaties on which the claims were based were different, with some different provisions; (3) the facts on which the claims were based might well have been different; and (4) even those treaty claims that seemed similar on their face might be susceptible to varying interpretations, given differences in contexts, object and purpose, and the parties' subsequent practice.[231] The *CME* tribunal also declined the invitation to determine that CME and Mr. Lauder were a "single economic entity," noting that such a determination could be made only in exceptional cases, ordinarily having to do with competition law, and was not generally accepted in international arbitration.[232] The Svea Court of Appeal concurred that there was no identity between the parties, and thus did not consider whether the claims raised in the parallel proceedings were duplicative.[233]

The relationship between the investor-state cases and the other tribunal proceedings has received less attention.[234] The dispute between the Czech companies ended with apparently no damages being paid. Yet CME suggested that had it won in those proceedings, it would have restored the money it received from the Czech Republic in the investor-

230. *See, e.g.*, Andrea K. Bjorklund, *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler ed., 2005); Brower & Sharpe, *supra* note 75; Franck, *supra* note 75; Noah D. Rubins, *Observations*, 2003 STOCKHOLM ARB. REP. 295 (2003) (discussing outcomes of various tribunals and possibility of duplicate relief)Goldhaber, *supra* note 75.

231. CME Final Award, *supra* note 222, paras. 432–33.

232. *Id.* para. 436.

233. Czech Republic v. CME Czech Republic B.V., 42 I.L.M. 919, 967 (Svea Ct. App. 2003) (Swed.).

234. The potentially preclusive effect of these cases was raised before the Svea Court of Appeal, but the court did not directly address the effect of those proceedings. *Id.* Given its decision about identity of parties with respect to CME and Mr. Lauder, it presumably would have found that the requirement of identity of parties was not met in those cases either.

state proceeding, thus apparently conceding the potential of duplicative recovery. The claims in those cases were, however, based on different legal theories against different defendants. Without some mechanism for reconciling the outcomes of the cases, a state defendant in the position of the Czech Republic can become a guarantor for private acts. One might analogize to the imposition of joint and several liability on multiple tortfeasors. Here it seems that both Železný and the Czech Republic were responsible, yet allocating damages between them was not part of any of the cases.

Consolidating the proceedings might have been possible, albeit difficult. The apparent fact that Dr. Železný, and the company he controlled, acted in concert with government officials to deprive CME of its ownership of TV Nova was of interest in both the investor-state cases. Hence, consolidating the cases against all parties might have been efficient and even instructive. CME and Lauder offered to consolidate proceedings in the investor-state cases, but the Czech Republic refused.[235] Unlike NAFTA Chapter 11, the investment treaties at issue lack consolidation clauses, nor do they have provisions for joining third party defendants. Yet parties have the autonomy to alter arbitration agreements and potentially could have joined all the cases.[236] However, doing so might have presented procedural difficulties, as none of the applicable rules contemplates such a procedure.

IV. COORDINATION: BARRIERS AND OPPORTUNITIES

The *Lumber* and *Lauder* disputes demonstrate the desirability of coordinating economic law disputes. They also show the dearth of tools available to international tribunals for that purpose. Recognizing the role that individuals now play in international law is but the first step in helping tribunals to develop those mechanisms. States continue to be the primary actors on the international stage, and could help resolve these problems when they draft treaties by considering potential conflicts and clarifying the relationship between treaties and between dispute resolution tribunals.

The starting point for managing inter-jurisdictional disputes is the law of the forum. An international tribunal looks first to the language of

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> "The Czech Republic does not consider it appropriate that claims brought by different claimants under separate Treaties (which give rise to obligations of the Czech Republic to two different sovereign States... under international law) should be effectively consolidated and the Czech Republic asserts the right that each action be determined independently and promptly."

CME Final Award, *supra* note 231, para. 428 (quoting letter from Respondent to the Tribunal (Nov. 15, 2000)).

236. For an analysis of the procedural hurdles to overcome in complex arbitrations, see Bernard Hanotiau, *Complex—Multicontract-Multiparty—Arbitrations*, 14 ARB. INT'L 369 (1998).

the treaty or agreement that constituted it, while a municipal court will look to its conflict of laws principles. Conflict of laws has not yet played a significant role in the globalization debate,[237] and relatively few conflicts tools have been adapted for use by international tribunals. This failure has partly to do with inter-systemic fragmentation; there is little perceived need for coordination since tribunals appear to apply discrete bodies of law. There is also no body with authority over all tribunals to police the application of any such principles and to harmonize divergent interpretations.[238]

For two reasons, the focus of the following section is largely on investor-state tribunals. First, many complex issues of inter-jurisdictional conflict have arisen in conjunction with cases brought under investment treaties. Second, the hybrid nature of those disputes illustrates the conceptual difficulties in applying public international law to disputes involving private individuals.[239] Investor-state tribunals have flexibility in sorting out complex and overlapping disputes, making them a good vehicle for examining existing approaches to problems of fragmentation and duplication. In other words, these tribunals can serve as laboratories in which other solutions can be tested and assessed.

A. TREATY DIRECTIVES

Many of the treaties that provide for constituting arbitral tribunals contain some direction for their tribunals with respect to managing potentially duplicative proceedings, or the status of various tribunals vis-à-vis one another. However, these provisions have not necessarily been interpreted in a manner calculated to minimize duplicative proceedings.

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237. Paul Berman and Ralf Michaels are two scholars who have indicated that conflict-of-laws approaches could provide useful approaches to the challenges posed by global legal pluralism. *See* Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1821 (2005); Ralf Michaels, *The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1212–13 (2006) (noting the potential role that conflict of laws could play in debates about global legal pluralism).

238. The same problems exist in federal states—the United States, for example, has no federal law of conflicts. The members of the European Union and the European Free Trade Area have to a large degree harmonized the exercise of jurisdiction and the recognition and enforcement of judgments. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 28 I.L.M. 620 (1989); Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229 (1969). The Brussels Convention has been superseded by the EU Regulation on Jurisdiction and Judgments, which provides rules to allocate jurisdiction as between the member countries. Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1. These arrangements are overseen by the European Court of Justice.

239. Yuval Shany suggests that the difficulty in finding a coherent approach reflects "an ideological divide between international judges and arbitrators over how best to address problems created by the multiplicity of legal sources and procedures implicated in contemporary investment disputes." Shany, *supra* note 11, at 844.

This failure appears to be largely due to tribunals' adherence to traditional public international law norms. Because of this adherence tribunals tend to give exaggerated deference to distinctions between laws that emanate from different legal systems or different treaties.

1. "Exclusivity" Clauses

Some treaties contain what might be termed exclusivity clauses—a directive that tribunals convened under that treaty have the exclusive right to hear cases brought under that treaty, or that a tribunal once seized of a case has the exclusive right to hear that case. An example of the former type of treaty is the European Convention, which provides, "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."[240] An example of the latter type is the ICSID Convention, providing, "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."[241]

The effectiveness of these provisions is untested. Their enforcement will often hinge on the willingness of other tribunals to honor them. For example, the WTO DSU states that members shall not take unilateral action in response to alleged treaty breaches, but rather shall submit all disputes to the Dispute Settlement Body.[242] Nonetheless, several regional free trade agreements either provide that trade disputes shall be heard exclusively by regional tribunals, or give member states the election of opting for either WTO dispute settlement or regional dispute settlement. When the agreement permits an election, the agreement generally provides that once that election is made it is exclusive.[243] The WTO Dispute Settlement Body has suggested in *obiter dicta* that it would recognize such a clause, but has not been called upon to do so directly.[244]

Effectiveness of exclusivity clauses may also depend on the extent of the authority exercised by the tribunal seeking to enforce its exclusive jurisdiction. An interesting set of questions has arisen in the MOX Plant case, a complicated environmental dispute between Ireland and the United Kingdom concerning Ireland's objection to the U.K.'s approval

240. Treaty Establishing the European Community, art. 292, Nov. 10, 1997, 1997 O.J. (C 340) 3 (1997). The EC Treaty established a Court of First Instance and the European Court of Justice. *Id.* arts. 220, 225.

241. ICSID Convention, *supra* note 49, at art. 26.

242. DSU, *supra* note 80, at art. 23.

243. For a catalog of such provisions, see Pauwelyn, *supra* note 34, at 281–85; Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction Between the TWO and RTAs, presented at* WTO Conference on Regional Trade Agreements (Apr. 26, 2002) (unpublished manuscript, available at http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf).

244. *Id.* at 287–88 (citing WTO Dispute Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, ¶ 7.38, WT/DS241/R (Apr. 22, 2003)).

and operation of a mixed oxide (MOX) fuel-processing plant in England. Ireland brought legal claims under a regional environmental treaty (the Convention for the Protection of the Marine Environment of the North-East Atlantic);[245] the Law of the Sea Convention;[246] and English law. All those claims were filed in different fora.[247] Before the European Court of Justice, the European Commission challenged Ireland's institution of proceedings before the International Tribunal for the Law of the Sea (ITLOS) on the grounds that the subject matter of the dispute lay within the competence of the European Community, and that consequently the European Court of Justice had exclusive authority to hear the dispute. The European Court of Justice agreed that Ireland had breached its obligations under the E.C. Treaty.[248] After finding that the ITLOS dispute related to undertakings on a subject "in which the respective areas of competence of the Community and the Member States are liable to be closely interrelated," the court stated: "The act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law."[249] The European Court of Justice did not address the effect its decision would have on the other pending cases.[250] The ITLOS suspended its proceedings awaiting the European Court of Justice decision, and the matter remains pending.[251]

The European Court of Justice has no authority over the ITLOS. Municipal courts in different jurisdictions, which also lack any hierarchical control over each other, sometimes attempt to protect their jurisdiction by issuing an "anti-suit injunction"—an order directing one or both parties before them not to persist in the other court proceedings.[252] Municipal courts have also been known on occasion to enjoin parties from proceeding with an arbitration.[253] Arbitrators have

245. Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 32 I.L.M. 1069 (1993).

246. UNCLOS, *supra* note 26.

247. A cogent and insightful discussion of *MOX Plant* cases may be found in Shany, *supra* note 11, at 846–47. His article was published before the European Court of Justice issued its final determination.

248. Case C-459/03, Comm'n v. Ireland, 2006 E.C.R. I-4635, paras. 168–83.

249. *Id.* paras. 176–77.

250. *Id.*

251. MOX Plant Case, Order No. 5 Suspension of Periodic Reports by the Parties (Ir. v. U.K.), (Jan. 22, 2007), *available at* http://www.pca-cpa.org/upload/files/MOX%20Order%20No5.pdf.

252. Emmanuel Gaillard, *Introduction* to IAI SERIES ON INTERNATIONAL ARBITRATION No. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 1 (Emmanuel Gaillard ed., 2005) [hereinafter IAI SERIES]; *see also* George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 620–23 (1990) (noting the use of anti-suit injunctions to enforce obligations previously undertaken by the parties, such as agreements to arbitrate).

253. Stephen M. Schwebel, *Antisuit Injunctions in International Arbitration: An Overview*, *in* IAI SERIES, *supra* note 252, at 5, 5–8.

enjoined parties from proceeding with competing arbitrations or with competing court proceedings, although they do so cautiously.[254] One of the drawbacks of the anti-suit injunction is the distinct possibility that the competing court or tribunal will respond with an anti anti-suit injunction.

Interpretive rules, such as *lex specialis*, may help tribunals to reconcile tribunal conflicts.[255] In the Southern Bluefin Tuna dispute, two tribunals under two different conventions were convened within months of each other to consider whether Japan had violated its obligations under either of the agreements. One was convened under the Convention for the Conservation of Blue-Fin Tuna ("CCBFT"), a five-nation treaty with the aim of conserving the pool of southern blue-fin tuna, a staple of the Japanese diet in particular, whose population was rapidly diminishing due to overfishing.[256] The second dispute was convened under the United Nations Convention on the Law of the Sea (UNCLOS) and heard by the ITLOS.[257] The ITLOS determined that the dispute could conceivably fall under its jurisdiction, but concluded that the States in question, by ratifying the more specific CCBFT Convention, had excluded the jurisdiction of the ITLOS.[258]

This decision was made easier by the fact that the disputing parties were States. Absent some limiting treaty provision, state parties to a treaty have the authority to disavow the protections of that treaty, vis-à-vis each other, in favor of a different regime. The tribunal convened under the more generalized regime abdicated its authority in favor of the tribunal arising from the specialized regime. The ITLOS held that it would be "artificial" to conclude that there was an UNCLOS dispute distinct from the CCBFT dispute.[259]

Treaty exclusivity clauses are useful mechanisms. Indeed, the most desirable course for states to follow is to spell out precisely in their agreements the scope of each treaty's authority, and how the treaties, and their tribunals, interact with each other.[260] Yet such specificity is elusive. Some rules, such as *lex specialis* and later-in-time rules, can help tribunals to reconcile inconsistent grants of authority, but their implementation may not be uniform.

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254. Laurent Lévy, *Anti-Suit Injunctions Issued by Arbitrators*, *in* IAI SERIES, *supra* note 252, at 115, 115–29.

255. *See* Lowe, *supra* note 97, at 193–95.

256. Convention for the Conservation of Southern Bluefin Tuna, Austl.-Japan-N.Z. May 10, 1993, 1994 Austl. T.S. No. 16.

257. Southern Bluefin Tuna (Aust. & N.Z. v. Jap.), 39 I.L.M. 1359, Award on Jurisdiction and Admissibility (Aug. 4, 2000).

258. *Id.*

259. *Id.* at 1388.

260. *See* Pauwelyn, *supra* note 34, at 304.

2. *Election of Remedies Clauses*

Investment treaties contain what might be viewed as specialized exclusivity clauses. Many treaties have so-called "fork-in-the-road" clauses, requiring an investor to choose either to submit a claim to arbitration or to dispute settlement in local courts. Once that choice has been made, the investor may not change his mind. In practice, however, this election has not, in many cases, proved to be preclusive of future investment arbitration because the clause has been interpreted to prohibit only proceedings based on identical legal bases.

Most tribunals to date have been faced with instances in which claimants first alleged violations of domestic law in municipal courts, and have later submitted to arbitration claims arising from the same dispute, but based on international law. Tribunals have generally held that because the law governing the claim differed, the fork-in-the-road clause was not triggered, and the investment treaty tribunal could exercise jurisdiction over the international law claims.[261] The distinction between violations of international law and domestic law is consistent with the conceptual divide between national and international law.[262] For example, the standards for breach of contract and a breach of international law are different.[263] Despite this distinction, tribunals have nonetheless recognized that a claimant's victory in one forum might have an effect on the damages awarded in the other.[264] This recognition suggests that the conceptual distinctions between international and national law are not as rigid as custom would suggest. The fork-in-the-road clauses do not, however, guide tribunals with respect to concurrent cases brought by related entities under BITs.

NAFTA Chapter 11 takes a slightly different approach that conceivably has a more preclusive effect. Article 1121 requires that investors seeking to initiate arbitration "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with

261. *See, e.g.*, Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic, ICSID (W. Bank) (Decision on Annulment), 6 ICSID Rep. 340 (July 3, 2002); Hamida, *supra* note 60; Christoph Schreuer, *Investment Treaty Arbitration and Jurisdiction over Contract Claims—The* Vivendi I *Case Considered*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 281, 289–95 (Todd Weiler ed., 2005) [hereinafter INTERNATIONAL INVESTMENT LAW]; Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims—the SGS Cases Considered*, *in* INTERNATIONAL INVESTMENT LAW, *supra*, at 325, 330–36.

262. *See* Hamida, *supra* note 60, at para. 16; Yuval Shany, *Jurisdictional Competition Between National and International Courts: Should International Jurisdiction-Regulating Rules Apply?* (May 2006) (unpublished manuscript, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902928).

263. Schreuer, *supra* note 261, at 295.

264. Hamida, *supra* note 60, at para. 20.

respect to the measure of the disputing Party that is alleged to be a breach."[265] It excludes proceedings for injunctive or declaratory relief, which are not available from NAFTA Chapter 11 tribunals.[266] This language is a clear effort to forestall duplicative proceedings. Because it addresses any proceedings with respect to "the measure" of the disputing state, it avoids the conceptual distinctions between domestic and international law. Excluding proceedings for non-pecuniary relief underscores the goal of avoiding duplicative proceedings.

Foreign investors and host states sometimes include forum selection clauses in their contracts that refer the parties to municipal courts or arbitral tribunals in the event of alleged contractual breach. A forum selection clause that purports to be exclusive, as most do, is difficult to reconcile with the later invocation of investor-state arbitration. Yet these clauses have generally not been construed to preclude an investment treaty tribunal from exercising jurisdiction. The rationale for this conclusion has varied. One is the conceptual distinction between claims based on domestic rather than international law. A second is the argument that investors lack the ability to waive treaty claims as those properly belong to the home state; the selected forum can only hear contractually-based claims.[267] A third reason, one not advanced yet by a tribunal but suggested by Professor Schreuer, is that a contract for investment treaty arbitration is not perfected until the investor accepts the host state's offer of arbitration by commencing a claim. The investor-state arbitration thus responds directly to an existing dispute. It is more specific than the general and prospective provision in the contract, and thus takes precedence because it is *lex specialis*.[268]

The problem with the first two approaches is that they tend to discount the autonomy the investor enjoys to contract freely and to waive its rights ex post (an investor can choose not to bring an investor-state claim, or can choose to settle a claim) without the concurrence of its home state. The third-party beneficiary approach described above helps to resolve the tension between viewing the investor as having direct rights over which he exercises control, and viewing the state as the only entity with control over the rights. The investor can benefit from the treaty, but lacks the ability to change the terms of the treaty or its obligations, which flow both to the state and to the individual. Once a dispute has commenced, however, the investor has the authority to conduct its quest for recompense as it sees fit.

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265. NAFTA, *supra* note 35, art. 1121.

266. *Id.*

267. If the treaty contains an umbrella clause, even the contractual claim may be heard by an international tribunal. *See infra* Section C.

268. Schreuer, *supra* note 261, at 294.

Ideally, as noted above, treaty provisions themselves should help to allocate responsibility among tribunals. The NAFTA Chapter 11 approach employs a reasonable accommodation between providing choice to foreign investors but limiting duplication and fragmentation of process and, more particularly, of result. No NAFTA tribunals have yet decided the effect of pre-dispute forum selection clauses on their jurisdiction.

3. "Umbrella" Clauses

One of the most vexing issues in investment treaty arbitration over the last few years has been the function and purpose of an "observance of undertakings" clause in an investment treaty.[269] By virtue of such a clause, a state promises to "observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."[270] The most popular interpretation of the clause is that it serves to bring any commitment made by the state to a foreign investor under the protective "umbrella" of the treaty. Any contractual breach thus becomes a treaty violation, and the investor can demand arbitration under the investment treaty in the event of the breach.[271] One commentator has suggested a more nuanced interpretation of the umbrella clause. The suggestion is that its protections come into play if the host government uses its sovereign authority to abrogate or interfere with its contractual commitments, but do not apply to an ordinary breach of contract dispute.[272] The other primary interpretation of this type of clause is that its purpose is merely to reiterate a state's general

269. Several pieces have been written on umbrella clauses within the last few years. *See* David Foster, *Umbrella Clauses—A Retreat from the Philippines?*, 9 INT'L ARB. L. REV. 100 (2006); Shany, *supra* note 11; Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231 (2004); Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARB. INT'L 411 (2004); Thomas Wälde, *The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INV. & TRADE 183 (2005); Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, (OECD Working Papers on Int'l Investment No. 2006/3), *available at* http://www.oecd.org/dataoecd/3/20/37579220.pdf.

270. SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID (W. Bank) Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, para. 115 (Jan. 29, 2004) [hereinafter *SGS v. Philippines*], *available at* http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf.

271. *See, e.g.*, Fedax NV v. Republic of Venezuela, ICSID (W. Bank) Case No. ARB/96/3, Award, *reprinted in* 37 I.L.M. 1391, 1395–97 (Mar. 9, 1998) (applying the "plain meaning" of the umbrella clause provision to find Venezuela was obligated to honor the terms of its agreement under the BIT); CMS v. Republic of Argentina, ICSID (W. Bank) Case No. ARB/01/8, Award, *reprinted in* 44 I.L.M. 1205, 1237–38 (May 12, 2005) (recognizing that umbrella clauses may protect commercial aspects of a contract in cases where there is "significant interference" by the sovereign with the rights of the investor).

272. Wälde, *supra* note 269, at 235. This interpretation is appealing in that it is consistent with the rationale behind offering foreign investors protection from host governments—governments by virtue of their inherent powers have the ability to change the political or business landscape. It also potentially alleviates the indefinite expansion concern raised by those tribunals that have refused to give umbrella clauses substantive meaning.

commitment to act in accordance with its obligations, but does not create an affirmative treaty obligation.[273] If it did so, then the jurisdictional reach of the treaty would be capable of nearly "indefinite expansion."[274]

Under the first view, an umbrella clause may effectively oust the jurisdiction of the municipal court that would otherwise be the presumptive forum to hear the municipal-law based breach of contract claim. As such, an umbrella clause could be seen as a weapon against fragmentation—all claims arising out of a single transaction, whether based on violations of international law or on breach of contract, could be heard in the same forum if the investor chose to bring such a claim. Though the contract claim would be a breach of the treaty for purposes of invoking the arbitral tribunal's jurisdiction, the tribunal would usually apply municipal law to the contract claim,[275] and international law to the other treaty-based claims (e.g., failure to accord national treatment, failure to accord the minimum standard of treatment). In *SGS v. Philippines*, the tribunal quoted Article 42(1) of the ICSID Convention:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[276]

In *Fedax v. Venezuela*, the tribunal stated that Venezuelan law, in particular, the Venezuelan Commercial Code, would apply.[277] Despite this *dépeçage*, there would likely be efficiencies in adjudication, since the dispute itself would arise out of a "common nucleus of operative fact."[278] Efficiency considerations thus cut in favor of interpreting umbrellas clauses to convert contractual breaches into treaty breaches subject to an investment treaty tribunal's jurisdiction.

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273. *See, e.g.*, SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID (W. Bank) Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, *reprinted in* 42 I.L.M. 1290, 1318–21 (Aug. 6, 2003) [hereinafter *SGS v. Pakistan*] (rejecting the notion that an umbrella clause operates to raise a breach of contract into a treaty violation); El Paso Energy Int'l Co. Ltd. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, para. 73 (Apr. 27, 2006), *available at* http://www.worldbank.org/icsid/cases/ARB0315DOJ-E.pdf (interpreting umbrella clauses to elevate any breach of contract to a treaty violation would render the substantive provisions of the treaty useless).

274. *SGS v. Pakistan*, *supra* note 273, at 1318–19; *see also* Schreuer, *supra* note 269, at 253–55; Wälde, *supra* note 269 at 215–16.

275. So long as the failure to observe a commitment stemmed from a contract, determining whether a state had abided by its contractual obligations would mean construing the contract under its governing municipal law.

276. SGS Société Générale de Surveillance SA v. Republic of the Phillippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, para. 28 (January 29, 2004) [hereinafter *SGS v. Phillippines*].

277. Fedax NV v. Republic of Venezuela, ICSID Case No. ARB/96/3, Award, para. 27 (Mar. 9, 1998).

278. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

Yet another layer of complication may arise, however, when the contract itself contains a choice of forum clause directing the parties to local courts. Can or should the investment treaty tribunal hear an "umbrella clause" dispute when the parties have selected in the contract an exclusive forum? In other words, can the parties preempt the jurisdiction of the investment treaty tribunal, at least insofar as the breach of contract claim is concerned, by choosing another forum in their contract? The *SGS Philippines* tribunal had to address this very question, as the agreement between SGS and the Philippines provided "All actions concerning disputes in connection with the obligations of either party to the Agreement shall be filed at the Regional Trial Courts of Makati or Manila."[279]

The *SGS Philippines* tribunal determined that it was doubtful that a claimant could waive the treaty obligations owed by one state party to another.[280] Yet, the tribunal also determined that a "party should [not] be allowed to rely on a contract as the basis of its claim when the contract itself referred that claim exclusively to another forum."[281] It styled its holding as one of admissibility; though it had jurisdiction over the claim, the forum selection clause rendered the claim inadmissible until the local courts acted.[282] It thus stayed its proceedings pending a decision by the municipal court on the breach of contract claim.[283]

Umbrella clauses are potential anti-fragmentation devices that permit the consolidation of cases before a single tribunal. Interpreting them to have substantive effect is both consistent with the language of the treaties and beneficial in terms of coordinating otherwise inefficient and duplicative proceedings.

B. PRECLUSION DOCTRINES

The two most commonly identified tools to resolve jurisdictional conflicts are the familiar doctrines of *res judicata* and *lis pendens*, or litispendence.[284] *Res judicata* governs the effect to be given an award or

279. *SGS v. Phillipines*, *supra* note 276, at para. 22. The clause also provided for the Agreement to be governed by and construed in accordance with the law of the Philippines. *Id.*

280. *Id.* at para. 154.

281. *Id.*

282. *Id.*

283. The Tribunal was not specific in the division of labor, nor did it clearly state what would happen after the Philippines court reached its decision. *Id.* at paras. 175–77.

284. Parallel proceedings have sparked renewed interest in these doctrines. *See, e.g.*, William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and* Res Judicata *Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. Rev. 357 (2000); Hamida, *supra* note 60; Christian Oetiker, *The Principle of* Lis Pendens *in International Arbitration: The Swiss Decision in* Fomento v. Colon, 18 ARB. INT'L 137 (2002); Reinisch, *supra* note 76; Söderlund, *supra* note 97; Yannaca-Small, *supra* note 97; Int'l Commercial Arbitration Comm., Int'l Law Ass'n Berlin Conference, Interim Report: "Res Judicata" and Arbitration (2004), http://www.ilahq.org/html/layout_committee.htm [hereinafter Int'l Law Assoc. Report] (follow "STUDY GROUPS"

judgment rendered by another tribunal, while *lis pendens* refers to the effect to be given concurrent proceedings. In addition to their use in both common and civil law systems, *res judicata* and *lis pendens* are generally accepted principles of international law.[285] *Res judicata* and *lis pendens* are available only as between international tribunals, and require identity of the parties as well as identity of the issues.[286]

While the principle of *res judicata* as between decisions of international tribunals is clearly recognized in international law, the principle has not been recognized as between international tribunals and national courts.[287] Thus, a decision on the merits of a case by a local court need be given no authority by an international tribunal reviewing largely the same events. The requirement that both tribunals be international has been construed very broadly to include both tribunals and courts. "The same legal order comprises international law and within it an international court is bound by a decision of an international arbitral tribunal and vice versa."[288] The same is generally true of *lis pendens*.

The requirement of identity of parties has been a stumbling block to the usefulness of both doctrines. The third-party beneficiary approach described above helps to overcome the problems posed by conceptual distinctions between states party to different treaties. By focusing on the claimants, rather than on the states, the important question is the relationship between the private claimants. While corporate law principles regarding distinctions between separately incorporated entities could prove to be another stumbling block, some tribunals have adopted an "economic approach" towards legal personality. The European Court of Justice has adopted a "single economic entity" doctrine, which in some circumstances permits the activities of a subsidiary to be attributed to a parent for competition law purposes.[289] Professors Schreuer and Reinisch have suggested that this flexible economic approach be extended to

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hyperlink, then follow "International Commerical Arbitration" hyperlink). For an excellent overview of preclusion doctrines and the objectives they serve, see Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 790–95 (2005) (discussing philosophies animating various jurisdictions as they formed their preclusion doctrines).

285. There is some disagreement whether they are customary international law or general principles of law, but there is general consensus that they are one or the other. Reinisch, *supra* note 76, at 44–45, 48; Pious Fund of the Californias (Mex. v. U.S.), Hague Ct. Rep. (Scott) 1, 5 (Perm. Ct. Arb. 1902); Dodge, *supra* note 284, at 365; Hanotiau, *supra* note 111, at 356–60; Int'l Law Assoc. Report, *supra* note 284.

286. Reinisch, *supra* note 76, at 50–51. Identity of facts plays an important role as well. *Id.* at 70–71.

287. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 52 (5th ed. 1998); Dodge, *supra* note 284, 367–70 (2000) (listing five reasons for this practice).

288. Reinisch, *supra* note 76, at 52.

289. *See, e.g.*, Case 6/73, Europemballage v. Comm'n, 1973 E.C.R. 215, 242; Case 48/69, Imperial Chem. Indus. v. Comm'n (Dyestuffs Case), 1972 E.C.R. 619, 662.

investor-state arbitration.[290] This recommendation is eminently sensible, although it has not yet received widespread support in investor-state arbitration.[291]

Identity of the issues in dispute is also usually required for *res judicata* or *lis pendens* to bar subsequent litigation. Identity of issues actually requires identity of both the object (the same type of relief) and the ground (the same rights and legal arguments).[292] These distinctions are most useful. Given that many tribunals have authority to order only limited types of relief, it is fundamental to determine whether the object in apparently duplicative proceedings is identical when deciding what effect to give the other proceedings. Fragmentation in available relief is undesirable from an efficiency standpoint, but from a fairness standpoint claimants should be able to maintain claims before various tribunals if that is what is required for them to be made whole.

In order to avoid "claim-splitting"—the practice of carefully tailoring claims before different tribunals to ensure that the objects of each do not overlap—tribunals have construed identity of object somewhat broadly.[293] Thus, if a claimant could have requested the same relief before an earlier tribunal, he will be barred from making the claim before a subsequent body.[294]

Identity of the grounds is the second component in the identity of issues rubric. Too restrictive an interpretation of this requirement would prevent the use of any preclusion doctrine. For example, a claim of breach of contract brought under English law in an English court could be viewed as distinct from a claim of breach of contract under U.S. law in a U.S. court. Discerning identity of grounds is more difficult when one is comparing treaty provisions. Investment treaties, for example, often have different provisions. In *Lauder*, Mr. Lauder alleged violations of various treaty provisions and of customary international law. In *CME*, the claimed violations were almost identical to those alleged in *Lauder*, albeit based on a different treaty. However, the rules of decision in the Czech Republic-Netherlands BIT involve a complex and apparently undifferentiated hierarchy of laws, including municipal law, that is not included in the U.S.-Czech Republic BIT.[295] Yet it would be almost

290. *Legal Opinion Addressed to the Tribunal in CME Czech Republic BV v. The Czech Republic*, TRANSNAT'L DISP. MGMT. (June 20, 2002).

291. *See* Hamida, *supra* note 60, at 30–31.

292. *See* Reinisch, *supra* note 76, at 61.

293. *See* Dodge, *supra* note 284, at 366.

294. *See* Reinisch, *supra* note 76, at 62–64.

295. Determining the applicable law is a difficult issue in any case involving issues of that cross borders or that cross other boundaries of sovereignty. In the United States, choice of law issues usually involve what might be termed "horizontal choices"—a court will be choosing between or among the laws of states of equal status. But United States choice of law can involve "vertical" issues, too—the competition between federal and state law to control any one issue. Choice of law in investment

absurd to say the grounds for relief were not identical in that case.[296]

Tribunals can look at the object and the ground for relief together to help resolve some of these questions. For example, a WTO violation is different from a NAFTA violation, yet relief before one tribunal may be adequate, as the CIT found in the case of Canada's seeking relief against the Byrd Amendment in two fora. Otherwise there must be case-by-case consideration, but with considerable discretion in tribunals' considering identical issues that relate to the same factual background.[297] Professor Reinisch suggests that tribunals can and should give a great deal of deference to the similarity of the facts of the dispute when very similar, albeit not identical, treaty rights are invoked.[298] Focusing on and parsing closely the relief sought is a good way for tribunals to discern whether the causes of action indeed give redress for distinct remedies.

Lis pendens differs from *res judicata* in that proceedings are concurrent; one must give way to the other, but it is not always clear which should have priority. Both civil and common law jurisdictions recognize *lis pendens* in the context of national court proceedings. Both generally follow a first-in-time rule mandating deference to the case that was filed first, thus inspiring a "race to the courthouse."[299] However, there is room for flexibility in the enforcement of the first-in-time rule. One commentator has urged that the principle be applied with an eye towards the "integrity of the arbitral process."[300] When the competition, so to speak, is between national courts and arbitral tribunals, treaty-based arbitrations have generally determined that the arbitral proceeding takes precedence.[301]

Professor Reisman recommended some years ago that ICSID annulment bodies take a "broad and inclusive" view of *res judicata*.[302] Investor-state tribunals, and international tribunals generally, should adopt a flexible approach to the requirements for invoking preclusions doctrines in order to coordinate concurrent and successive proceedings

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arbitration is even more complicated, as tribunals are faced with the potential applicability of the laws of various municipal states, international procedural rules governing the conduct of the proceedings, and both conventional and customary international law. For a discussion of the complexities in the applicable law governing investor-state arbitration, see Meg Kinnear, *Treaties as Agreements to Arbitrate: International Law as the Governing Law*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? (A.J. van den Berg ed., ICCA Cong. Series No. 13, 2007).

296. For example, in *Bluefin Tuna* the ITLOS determined that it would be "artificial" to conclude that the disputes under the CCBFT and the UNCLOS were distinct. *See supra* note 257 and accompanying text.

297. *See* Reinisch, *supra* note 76, at 68.

298. *Id.* at 70–72.

299. *See* Reichert, *supra* note 70.

300. *Id.* at 255.

301. *Id.* at 250–52.

302. W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 97–102 (1992).

that will continue to occur. International tribunals should also consider adopting doctrines such as collateral estoppel (issue preclusion) which would permit a tribunal to consider the findings of other tribunals with respect to factual issues, even when there is not strict identity of the parties, though this approach has not been favored in the past.[303]

C. ABSTENTION DOCTRINES

Abstention doctrines, whether grounded in comity or in law, are one device that common law courts especially have utilized when faced with concurrent proceedings.[304] The doctrines of comity and *forum non conveniens* are two bases for a court's declining to exercise jurisdiction. Both are potentially useful mechanisms for international tribunals as well.

The U.S. Supreme Court defined comity as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[305] Tribunals exercise comity because it is in their self-interest that other tribunals exercise comity towards them.[306]

Whether international tribunals have the authority to decline to exercise jurisdiction they clearly possess is unsettled. Many international tribunals have been reluctant to decline jurisdiction conferred on them by treaty or by agreement on the grounds that doing so is outside their authority.[307]

There is limited precedent for the invocation of comity as a ground for one international tribunal bowing to another. In the *MOX Plant* case, the ITLOS suspended its proceedings "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and

303. *See* Hanotiau, *supra* note 111, at 359–60 (noting that in the *Pyramid* case, or *SPP v. Egypt*, the ICSID Tribunal suggested that such deference would be an abdication of the Tribunal's responsibility to make its own findings of fact).

304. Civil law courts have usually adhered to the principle that a tribunal having jurisdiction is obliged to exercise it.

305. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

306. Karl Meessen suggests that "mutual adjustment," or comity, involves "pursuing one's enlightened self-interest, which regularly involves partial or even total deference to another state's enlightened pursuit of its self-interest and vice versa." KARL MEESSEN, ECONOMIC LAW IN GLOBALIZING MARKETS 95 (2004).

307. *See* Lowe, *supra* note 97, at 197. This reluctance must be distinguished from a tribunal's conclusion that the jurisdictional grant in one treaty has been modified and narrowed by a subsequent jurisdictional grant in another treaty. *Id.*

obligations as between two states."[308] Recently, moreover, the ICJ has suggested that it has the inherent power to decline jurisdiction in order to safeguard the administration of justice, the underlying aim of any system of dispute settlement.[309]

Other international tribunals, including arbitral tribunals, should follow the lead of the ICJ in determining that they have the inherent authority to decline to exercise jurisdiction in the interest of justice. While this authority should be exercised sparingly, using it in situations where there has been an abuse of rights, or even merely on grounds of comity, makes sense. It can help to manage duplicative proceedings and to preserve the legitimacy of international dispute settlement.

The focus in a *forum non conveniens* case is usually on the burdens placed on the parties and the suitability of a particular forum, rather than on respect for another tribunal's jurisdiction. The English rule of *forum non conveniens* is summarized by Dicey and Morris as follows: "There must be another forum to whose jurisdiction the defendant is amenable, which is clearly or distinctly more appropriate than the English forum, i.e. is a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice."[310] The applicability of *forum non conveniens* to international tribunals is questionable.[311] An initial question is whether another tribunal has jurisdiction over the dispute. Because international tribunals only have jurisdiction if the parties to a proceeding have consented, it is difficult for a defendant to argue that fairness requires the case to be heard in one tribunal rather than another.[312] International tribunals tend to be in neutral locations. If a particular dispute would more conveniently be heard in a particular location, hearings can be held in that locale. Yet *forum non conveniens* might be a useful tool when a tribunal is faced with a claim that might more suitably be heard in another forum, either due to the law likely applicable to the dispute or to the subject matter of the case.[313] Given the

308. The MOX Plant Case (Ireland v. U.K.), 42 I.L.M. 1187, 1191 (Perm. Ct. Art. 2003). The tribunal added "[m]oreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties." *Id.*; *see also* Hamida, *supra* note 60, paras. 100–01 (noting two other cases in which tribunals exercised comity in suspending proceedings).

309. Legality of the Use of Force, Decision on Preliminary Objections (Serbia & Montenegro v. Belg.), 2004 I.C.J. 426, para. 33 (Dec. 8).

310. DICEY & MORRIS, *supra* note 84, at 395–400 (discussing Rule 31(2)).

311. Professor Vaughan Lowe doubts its suitability for application in the context of inter-state dispute settlement. Lowe, *supra* note 97, at 200–01.

312. *Id.*

313. Professor Ernie Young has suggested that assessing competence of the different institutions should guide interjurisdictional disputes between national and supranational courts. Young, *supra* note 12, at 1143 ("[D]ecisions should be allocated to particular institutions on the basis of institutional competence and . . . decisions by the primary institution, once made, should generally be respected absent a sufficiently good reason for overruling them.").

specialized nature of varied tribunals, certain cases might be best heard in tribunals with expertise in a particular subject matter, or in the applicable law.

CONCLUSION

A certain amount of disorder is inevitable in the formative stage of any endeavor. The proliferation of international tribunals is a phenomenon of the last fifty to sixty years, but the real explosion in their use is much more recent. The fragmentation among international tribunals exacerbates the tendency towards disorder. Rather than operating as one system, several mini-systems act in parallel.

On balance, the potpourri of potential relief fragmented among various tribunals is undesirable; it leads to duplicative and inefficient proceedings. At first blush, the ability of investors and their related entities to bring parallel claims for potentially duplicative relief seems like an advantage in that two bites at the apple are often better than one. Yet that apparent advantage threatens the legitimacy of international dispute settlement systems generally.

It is important to be idealistic but pragmatic about the possibility of diminishing the fragmentation among tribunals and minimizing duplication. An idealistic vision might call for the establishment of a world commercial court having jurisdiction to hear international economic law cases. Yet the chances of the world community establishing a single international commercial court are nil for the moment—the Multilateral Agreement on Investment failed rather spectacularly in the late 1990s, and even the much more modest goal of an appellate body to be housed within ICSID received little support when it was mooted in 2004. The limited result finally reached by the Hague Conference on Private International Law in its attempt to negotiate a global jurisdiction and judgments convention, as well as the tenuous negotiations in the Doha Round, tend to make one think less of a global solution to resolving conflicts among the jurisdictions of international tribunals. Rather, solutions will likely emanate from the tribunals themselves.

Developing tools to manage the inevitable jurisdictional clashes is essential to maintaining the long term viability of international dispute settlement To date, however, progress on the coordination of disputes has been haphazard and inconsistent. The lack of analytic clarity about the level of autonomy and authority that indiviual claimants appearing before international tribunals should exercise forms one of the primary hurdles to coordinating overlapping juisdictions. Simply recognizing that private rights exist is an inadequate solution. First, it is clear that those rights are not unbounded. Second, fitting private rights into a legal order developed around states is difficult. Viewing individuals as third-party beneficiaries of treaties entered into between states is a third-way

approach that recognizes a grant of legal rights to individuals, limitations on the rights conferred, and a continuing identity of interest between those individuals and their home states.

Friedrich von Hayek portrayed law as a continuously adapting process, much like a market place.[314] The hybrid nature of investment treaty arbitrations makes it an ideal laboratory for testing new solutions to problems of transnational governance and dispute settlement. Viewing individual claimants as third-party beneficiaries of investment treaties permits preclusion doctrines to operate inter-systemically as well as inter-arbitrally. Tribunals ought also to adapt other conflict-of-laws tools, such as abstention doctrines like *forum non convenien*, to facilitate coordination among them. These approaches would facilitate communication, coordination, and ultimately harmonization in the settlement of international economic law disputes.

314. FRIEDRICH VON HAYEK, LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER 65 (1973).

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